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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CORPORACION VENEZOLANA DE FOMENTO,

Petitioner,

v.

THE MERBAN CORPORATION, ROBERT J. REDMOND, VINTERO CORPORATION, VINTERO SALES CORPORATION and VINCENT A. DE LYRA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Where the essential dispute is a claim by a Swiss corporation against a Venezuelan governmental agency on a guaranty, is it permissible to expand the scope of federal jurisdiction to encompass the dispute solely by reason of the presence of a federally chartered bank as a depositary-stakeholder bereft of any interest in the outcome?

2. May a federal court resort, in the name of depeçage or otherwise, to undefined "principles of transnational

commercial law" to support liability of a Venezuelan government agency without regard to either (a) the law of Venezuela negating the power and capacity of such agency, here applicable under the federal conflicts rule, or (b) the alternatively applicable substantive rules of federal and state law governing contractual liabilities of public instrumentalities, which rules would have mandated the same result as the law of Venezuela?

PARTIES TO PROCEEDINGS BELOW

The Plaintiff was Corporacion Venezolana de Fomento ("CVF").

The Defendants named in the Complaint were the Merban Corporation ("Merban"), Merban International, Inc., Robert J. Redmond, James E. Himoff, Vintero Corporation and Vintero Sales Corporation (collectively "Vintero"), Vincent A. De Lyra, Venezolana de Cruceros del Caribe, C.A. ("Cariven") and Security Pacific International Bank ("SPIB").

Merban asserted a counterclaim against CVF. Defendant SPIB was dismissed voluntarily from the action by CVF on July 18, 1977. Defendant Himoff was dismissed voluntarily from the action by CVF on October 11, 1978.

Six banks, namely, Canadian Imperial Bank of Commerce, Royal Bank of Canada International Limited, Banque Canadienne Nationale, Banque Provinciale, American Security Bank, N.A. (formerly "American Security and Trust Company"), and La Salle National Bank (hereinafter collectively referred to as the "six participating banks") intervened in the action to assert claims against CVF. Their claims were settled by CVF in 1979. Thus, Merban is the only remaining party with a claim against CVF.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on July 28, 1980, not yet officially reported, is printed in the Appendix (1a). The opinion of the United States District Court for the Southern District of New York entered on September 26, 1979 is reported at 477 F.Supp. 615 and is printed in the Appendix (21a). The order of the Court of Appeals entered on June 27, 1979 is reported without opinion at 607 F.2d 994 and is printed in the Appendix (39a). The opinion of the District Court entered on February 13, 1979, not yet officially reported, is printed in the Appendix (42a). The opinion of the District Court entered on April 14, 1978 is reported at 452 F.Supp. 1108 and is printed in the Appendix (72a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1980.

The jurisdiction of this Court to review the judgment is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISIONS INVOLVED

The Edge Act, 12 U.S.C. § 632, provides in pertinent part* that:

> " * * * [A]ll suits of a civil nature * * * to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign bank-

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* The full text of 12 U.S.C. § 632 is set out in the Appendix (122a).

ing, * * * or out of other international or foreign financial operations, * * * shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district * * *."

STATEMENT OF THE CASE

A. The Facts

Petitioner Corporacion Venezolana de Fomento ("CVF") is an "autonomous official institute," *i.e.*, a governmental agency, of the Republic of Venezuela, and an appendage of its Ministry of Development. Its statutory function is to promote industrial investment as part of national economic planning. CVF's powers are circumscribed by the Constitution of Venezuela, and, among other statutes governing public entities, by the Law for the Protection and Development of the National Merchant Marine (the "Merchant Marine Law," 120a).

Respondents Vintero Corporation and Vintero Sales Corporation (collectively "Vintero") are New York corporations controlled by Respondent Vincent A. De Lyra, a U.S. national and resident ("De Lyra"). De Lyra, together with one Gascue, a Venezuelan confederate, also controlled, through Venezuelan nominees, a Venezuelan corporation, Venezolana de Cruceros del Caribe, C. A. ("Cariven"), of which De Lyra was the "49% owner" and "consider[ed] himself a joint venturer or perhaps an undisclosed principal" (4a-5a; 55a-56a). (Such ownership was illegal in that it exceeded the 20%

permissible by Venezuelan law.) Cariven had no business, assets or capital, and neither of its principals had any experience in shipping.

This case stems from CVF financing guaranties fraudulently obtained by De Lyra in favor of Cariven, ostensibly to acquire for Cariven two cruise ships for Venezuelan-flag operation.

Respondent Merban Corporation ("Merban") is a Swiss corporation with offices in both New York and Caracas. Its business consists, *inter alia,* of purchasing and reselling debt instruments issued or guaranteed by financial institutions or government entities, particularly in Latin America. It had "representatives" throughout South America, including De Lyra for Venezuela.

De Lyra/Gascue caused Cariven to enter into a Guarantee Agreement with CVF, dated March 11, 1974, employing a variety of fraudulent representations. By the Guarantee Agreement, whose terms were concededly known to Merban, CVF undertook to guarantee loans to Cariven for the purchase of two ships meeting certain conditions and requirements, including Venezuelan statutory requirements, for up to two-thirds of the reasonable value of the ships. Later that year, Merban entered the ship purchase project and, in effect, took over its financial side.

On April 30, 1975, and October 15, 1975, respectively, Merban, the underwriter, made two Loan Agreements committing to lend Cariven $11,627,900 on CVF's guaranties. The ship acquisition was a sham whereby De Lyra (through Vintero) "sold" to his own Venezuelan company, Cariven, for $17,441,860 (a fictitious price calculated to exhaust the CVF guaranty commitment),

two over-age ships, the "Santa Rosa" and the "Bahama Star," acquired by De Lyra for $2,204,746, lent to him almost entirely by Merban. Less than $1,000,000 was expended by De Lyra toward refurbishing the ships.

The Merban-Cariven Loan Agreements, signed by the borrower, Cariven, and countersigned by CVF, as guarantor, in Caracas, were in Latin-American form and in Spanish. The total Merban loan commitment of $11,627,900 (one-half for each ship) was made payable (out of funds of Merban and those of the six participating banks), not directly to Cariven, as the "purchaser," but to De Lyra's "seller," Vintero, via another bank, Security Pacific International Bank ("SPIB").

SPIB was in no way involved in any phase of the financing nor in the supply of any funds. As the disbursing agent of Merban and of the six participating banks, SPIB issued a letter of credit listing the documentation on which SPIB would disburse the Merban-supplied funds to Vintero. Merban subdivided the resulting debt into 16 Cariven promissory notes (the "Notes"), each in the amount of $726,743.75. Retaining an undivided interest (about 27%) in the Notes for its own account, Merban distributed the balance of the interest to the six participating banks, with SPIB being appointed custodian of the Notes and disbursing agent for payments thereon. Each note bore a guaranty endorsement of CVF (76a), expressly reciting the purported official authorizations CVF had received from the Venezuelan authorities for the guaranties thereunder, as did the Merban Loan Agreements themselves.

The Public Law of Venezuela, cited expressly in the Loan Agreements and Notes, limits the power of public

instrumentalities such as CVF to undertake credit transactions. Thus, Article 5 of the Merchant Marine Law, which is administered by the Venezuelan Ministry of Communications and which is referred to in the Merban Loan Agreements (120a-121a), provides in substance that any acquisition of ships to be effected through guaranties by public entities (such as CVF) is subject to the prior approval of the Venezuelan Controller General and of the Ministry of Communications under the terms of implementing regulations. In turn, Article 11 of the Regulations provides that:

> " * * * In no case will the Ministry of Communications give its approval when it concerns ships for maritime transport whose age may be fifteen or more years * * *."

Article 231 of the Venezuelan Constitution lays down that, save for immaterial exceptions, public credit operations require for their validity a special law which authorizes them, and Article 232 thereof provides that:

> "The [Venezuelan] State shall recognize no other obligations than those contracted by legitimate agencies of the Public Power, in accordance with its laws."*

Although purported Controller General approval was adduced below for the first ship ("Santa Rosa"), none

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* Unlike private persons, governmental agencies may only manifest their intention to contract validly through full and regular fulfillment of the statutory conditions and formalities. Else, there is no capacity in the agency to contract. Prof. A. R. Brewer-Carias, *Las Instituciones Fundamentales del Derecho Administrativo* (Fundamental Institutions of Administrative Law), § 133 at 169 (Caracas 1964).

was adduced for the second ("Bahama Star"). *Neither* ship was ever approved, even purportedly, by the Ministry of Communications. (Indeed, the "Bahama Star" was expressly *disapproved* by the Ministry.) As we have seen, Article 11 of the Regulations posits a maximum age limit of 15 years; and in 1975, when the purported CVF guaranties were given, the "Santa Rosa" was 17 years old and the "Bahama Star" was 18.

Although the District Court and Court of Appeals both had before them the cited Statute and Regulations, they looked solely to the two Loan Agreements, which (as drafted by Merban's Venezuelan attorney) required approvals only from the Controller General; they failed to look to the Merchant Marine Law, expressly requiring prior approvals from *both* agencies.

As noted, the funds disbursed by SPIB were Merban's and not SPIB's. SPIB itself lent no funds, nor did it incur any other business risk in the transaction. Thus, $8,287,500 in CVF-guaranteed funds were paid out by SPIB to Vintero (*i.e.*, De Lyra) on the mere signed statements of De Lyra, his counsel, and Merban itself. It is undisputed that such payment by SPIB was in full conformity with the two letters of credit that Merban had thus caused SPIB to issue.

B. Litigation History; Federal Jurisdiction

CVF's complaint, praying for a declaratory judgment that its guaranties of the Notes were void for lack of required approvals and for fraud, was filed on April 9, 1976, and alleged diversity jurisdiction under 28 U.S.C. § 1332 (105a). In the first District Court decision granting the six intervening banks summary judgment against CVF, while denying it to Merban (72a and 97a),

Judge Conner held that there was diversity jurisdiction, both as to CVF's claims and the counterclaims asserted by Merban (74a). In the second District Court decision (after a trial on certain issues), Judge Sweet accepted without discussion that there was diversity jurisdiction (44a).

Following rendition of the second decision, and while the first decision was still on appeal, CVF, through substituted counsel, moved to dismiss for lack of subject matter jurisdiction. The Court of Appeals thereafter remanded the part of the case then on appeal to the District Court for reconsideration of the jurisdictional issues (40a-41a).

On reconsideration of the jurisdictional issues raised by CVF, the District Court correctly found that there was no diversity jurisdiction because plaintiff CVF and defendant Merban were both foreign corporations (24a). Judge Sweet concluded, however, that there was subject matter jurisdiction because "the defendants' counterclaims arise under the Foreign Sovereign Immunities Act and under the Edge Act" (24a); and he permitted defendants to amend their pleadings to assert federal question jurisdiction under U.S.C. § 1331 (37a).

On appeal, the Court of Appeals affirmed the District Court's decision that there was no diversity jurisdiction (7a). While the Court of Appeals also affirmed the finding of jurisdiction of CVF's claims under the Edge Act (12a-14a), it did so on grounds the District Court had considered and rejected. According to the Court of Appeals, there was federal jurisdiction because the complaint named SPIB, a federally chartered bank, as defendant, and SPIB's involvement in the case arose out of a transaction involving "foreign banking." The Court

of Appeals disagreed with the District Court's finding that SPIB was merely a nominal party whose brief presence in the action did not provide a basis for jurisdiction under the Edge Act.

The Court of Appeals further held that there was ancillary jurisdiction as to the counterclaims asserted against CVF by Merban, and that this was not defeated when SPIB was voluntarily dismissed from the case. Finally, the Court reversed the District Court's finding that there was jurisdiction of these claims under the Foreign Sovereign Immunities Act (8a).

Thus, after three District Court decisions in which the basis of CVF's claim and Merban's counterclaims was transformed from diversity to federal question jurisdiction under the guise of the Edge Act and the Foreign Sovereign Immunities Act, jurisdiction of CVF's claim now rests solely upon the Court of Appeals' improper application of yet another aspect of the Edge Act.

Jurisdiction of Merban's counterclaims is entirely ancillary to the main claim.

In its first substantive decision, the District Court held that the six intervening banks were holders in due course of negotiable instruments (the participation certificates purchased from Merban) and were therefore entitled to judgment on the Notes. Misapplying New York agency and estoppel principles, the District Court concluded that the issue raised by CVF as to the lack of due authorization of the CVF guaranties was not to be determined in accordance with any Venezuelan legislation. It dismissed the requirement of Ministry of Communications statutory approval as a mere contractual condition and as a matter of "internal" CVF procedures (83a-84a). Along with the fraud issue, the

Controller General requirement was relegated to an evidentiary trial. After trial, another District Judge held CVF liable upon the guaranties, concluding that Venezuelan public law was either not relevant or not entitled to respect, either in determining the validity of the Venezuelan Controller General's "approval," or the broader issue whether CVF had legal power or authority to issue the guaranties (53a-54a; n.18); in sum, that the Court's notions of equity and estoppel were dispositive. In a misapplication of New York tort law, the Court also absolved Vintero and De Lyra of actionable fraud (61a-67a), but this holding was upset by the Court of Appeals (18a-20a).

The Court of Appeals for the Second Circuit disallowed CVF's claim of invalidity for lack of statutory power and authority along with CVF's claim that its Board had purported to authorize only transactions materially different from those which emerged in the Merban-Cariven Loan Agreements. Deeming CVF's status as a governmental entity to be irrelevant, the Court stated that "[t]he validity of a guarantee relied upon in international commercial transactions cannot be governed *solely* by the internal public law of the guarantor's home country without reference to established principles of transnational commercial law" (14a-15a). (Emphasis supplied). In fact, the Court gave no consideration at all to Venezuelan law, public or private, except upon the De Lyra aspect of the case. There, the Court held that whether or not actionable fraud was committed on CVF by the De Lyra interests was a question "best resolved under Venezuelan law" (19a). It therefore reversed and remanded this part of the case for a reconsideration of the fraud issue. The Court did not explain what it meant by "principles of transnational commercial law."

REASONS FOR GRANTING THE WRIT

I. This Court should narrowly redefine the extent to which the mere presence of a nominal party in a federal court may be used as the lever for extending federal jurisdiction over disputes between alien parties on subject-matter unconnected with federal law or policy.

In finally relying upon SPIB's brief presence in the case as a named defendant to sustain jurisdiction under the Edge Act, 12 U.S.C. § 632, the Court of Appeals violated long standing guidelines approved by this Court for determining whether a defendant is a "real" or merely a "nominal" party to the action. Because it contains a grant of original jurisdiction to the District Courts and was expressly intended to serve the limited purpose of providing federally chartered banks with access to these courts when they faced liability for transactions involving foreign banking, the Edge Act is an important federal statute and this Court should exercise its power of supervision in properly restricting the scope of federal jurisdiction which it provides.

In sustaining federal jurisdiction the Court of Appeals improperly overrode the District Court's finding as to SPIB's nominal role in this case. In the last of the three District Court decisions, Judge Sweet correctly adopted Judge Conner's finding that "the role played by Security Pacific in this affair was simply that of depository and collection agent." (34a) As stated by Judge Sweet:

> "According to the terms of the certificates it issued, [SPIB's] duties and liabilities were limited to presenting the notes for collection at maturity and

> accounting for the amount received for the notes. (Footnote omitted) Consequently, *Security Pacific was subject to no apparent liability for CVF's claim.* Mere stakeholders or escrow agents which are not subject to liability in the lawsuit, are not real parties to the action, and their presence does not provide a basis for jurisdiction. See *Bata v. Central Penn National Bank of Philadelphia,* 23 F.Supp. 91 (E.D. Pa. 1903); *Chase National Bank of New York v. Directorate General,* 95 F.Supp. 733 (S.D.N.Y. 1959). Accordingly, a party whose role in the lawsuit is merely that of a depository or stakeholder is to be classified as a nominal party. *Armstrong Cover v. Whitfield,* 418 F.Supp. 972 (N.D. Ga. 1976). Since Security Pacific was merely a depository and collection agent, and not potentially liable in this action, its brief presence in the action did not confer jurisdiction under 12 U.S.C. § 632." (34a-35a) (Emphasis added)

The District Court's finding was more than amply supported by the facts. While the complaint named SPIB as a defendant, SPIB is nowhere mentioned therein and no specific claims were alleged against it. (104a) Considerable evidence concerning SPIB's role in the transaction was gathered in pre-trial discovery, and resulted in a voluntary dismissal of SPIB from the action on July 18, 1977, (116a) some nine months *before* the first District Court decision was rendered, (97a) and nearly two years before Judge Sweet issued his opinion on the merits. (71a)

Without deciding the question of whether jurisdiction would have properly been founded if, as the District Court held, SPIB were merely a stakeholder, and thus a nominal party, the Court of Appeals found jurisdiction

under a different application of the Edge Act by concluding that SPIB was a "true party" under § 632. The Court stated:

> "There is, however, another possible basis for Edge Act jurisdiction. SPIB is a nationally chartered bank entitled to the protection offered by 12 U.S.C. § 632. But Judge Sweet thought that, as a mere stakeholder, SPIB was not exposed to any potential liability. Thus, in his view, its presence as a defendant was not sufficient to confer jurisdiction. *Bata v. Central Penn Bank of Philadelphia,* 223 F.Supp. 91 (E.D. Pa. 1963).[6] Judge Sweet relied on Judge Conner's statement that 'the role of Chemical and Security Pacific was that of a depository and collection agent.' 452 F.Supp. at 1116. But Judge Conner's opinion dealt with the question of whether or not the purchasing banks were holders in due course under the U.C.C., and his discussion of the status of SPIB is limited to its role as custodian of the actual notes sold by Merban to the purchasing banks. SPIB played another role in the Cariven-Merban transaction—that of the provider of a letter of credit for Vintero's benefit on Cariven's account. SPIB was named in CVF's complaint as a defendant who, allegedly, had wrongfully allowed drawdowns by Vintero against the letter of credit—drawdowns which were wrongful because of Vintero's alleged failure to comply with what CVF said were conditions precedent on the money's availability binding on SPIB. CVF's complaint clearly viewed SPIB as potentially liable for damages. SPIB is a federally chartered bank, and the transaction in which Vintero, in New York, drew on a letter of

> credit on the account of a Venezuelan corporation, Cariven, was one involving 'international or foreign banking.' SPIB was thus a true party to the action, and jurisdiction inhered in the district court under 12 U.S.C. § 632. (Footnotes omitted (12a-13a).)"

It is plain that the Court of Appeals found the factual basis for its statements concerning SPIB's purported "other" role in the case *solely* in the complaint. As stated in Footnote 6 to its opinion:

> "Although CVF did not allege Edge Act jurisdiction in its complaint, the existence of such jurisdiction appears from the facts alleged in the complaint." (13a n.6)

It is plain, however, from the face of the complaint that no claim was addressed to SPIB except in its role as a depository and collection agent. Moreover, the facts as set out in Judge Conner's decision fully describe SPIB's role in the transaction. While the voluntary dismissal of SPIB after pre-trial discovery should be proof enough of its purely nominal status, the undisputed facts as to its role in the letter of credit transaction, as found by the District Court, plainly afford no basis for suggesting that SPIB was at any time faced with the prospect of liability to CVF.

SPIB's role in the transactions was fully developed in the pre-trial discovery and in the affidavits submitted in connection with motions for summary judgment which resulted in the first of the District Court decisions. See 77a-78a; 87a-88a; 91a-92a. On the basis of the facts so developed, there was no room for doubt that SPIB was no more than a nominal party whose activities did not afford any basis for liability to CVF.

Even assuming that the Court of Appeals reading of the complaint was correct (which, CVF submits it was not), in concluding that SPIB was thus a "true party to the action" that court improperly departed from a long established rule approved by this Court and followed in other Circuits that the test of whether a defendant is a nominal party depends ultimately on the facts of each case. *Tri-Cities Newspapers, Inc. v. Tri-Cities P.P. & A Local 349,* 427 F.2d 325, 327 (5th Cir. 1970).

As the Court stated in *Armstrong Cover Co. v. Whitfield,* 418 F.Supp. 972, 973 (N.D. Ga. 1976) in deciding whether to grant a petition of the United States Postal Service to remove a case to the District Court, "this Court must look beyond the pleadings and examine the petitioning party's real interest in the dispute."

Armstrong Cover, supra, is in accord with numerous decisions of this Court, including *Dawson v. Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co.,* 197 U.S. 178 (1905); *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182, 190 (1924); *Bacon v. Rives,* 106 U.S. 99 (1882). *See also: Land v. Dollar,* 330 U.S. 730, 734, 735 n.4 (1947); *Binderup v. Pathe Exchange, Inc.,* 263 U.S. 303, 305-206 (1923).

The clear purpose of the Edge Act is to guarantee national banks access to the District Court only when they are faced with a real exposure to liability. SPIB's "brief presence" (35a) in the case ended more than two years before the Edge Act was ever suggested as a basis of federal jurisdiction, and it cannot possibly be said that the purposes of the Edge Act have been served by its application in this case. Compare with the present case, *Travis v. National City Bank,* 23 F.Supp. 363 (S.D.N.Y. 1938), *National City Bank v. Puig,* 106 F.Supp. 1

(D.P.R. 1952), *United Technologies Corp. v. Citibank N.A.*, 469 F.Supp. 473 (S.D.N.Y. 1979) and *National City Bank v. Republic of China,* 348 U.S. 357 (1955), in which the national banks involved did face real exposure to liability.

Indeed, it is plain that the Court of Appeals has attempted to breathe life into a claim which never exposed SPIB to liability to find at least some artifice for retaining jurisdiction. The implications of the decision are far reaching. If it were permitted to stand, it would establish the principle that in any action arising out of a foreign or international banking transaction where a national bank has even the most tenuous role, federal jurisdiction can be secured under the Edge Act by merely naming the national bank as a defendant. This surely was not the intent of Congress in enacting the Edge Act.

Because SPIB was only a nominal party, therefore, its temporary presence in the case was not a sufficient predicate of jurisdiction under the Edge Act. *Salem Trust Co. v. Manufacturers' Finance Co.,* 264 U.S. 182 (1924); *Bacon v. Rives,* 106 U.S. 99 (1882); *Farmers' Bank v. Hayes,* 58 F.2d 34, 36 (6th Cir. 1932).

CVF does not quarrel with the Court of Appeals' conclusion that if there was jurisdiction under the Edge Act with respect to the principal claims, SPIB's dismissal from the case would not defeat ancillary jurisdiction of Merban's counterclaims. However, if this Court agrees that there was no jurisdiction under 12 U.S.C. § 632 in the first instance, the ancillary claims must be dismissed. *Pennsylvania R. R.* v. *Erie Avenue Warehouse Co.,* 302 F.2d 843, 845 (3d Cir. 1962); *Kelleam* v. *Maryland Casualty Co.,* 312 U.S. 377 (1941); *Manufacturers*

Casualty Insurance Co. v. *Arapahoe Drilling Co.*, 267 F.2d 5, 8 (10th Cir. 1959); *Bata* v. *Central Penn-National Bank*, 223 F.Supp. 91 (E.D. Pa. 1953).

II. The power and capacity of a foreign governmental agency are, by the case law of this Court, referable to its own home law, which law happens here to coincide with this Court's substantive rule that the unauthorized obligations of a government agency will not be enforced. Even if there were a legal vacuum in these two areas, as there is not, neither "depeçage" nor "transnational commercial law" justify disregard of this Court's controlling decisions.

In choosing a law to apply on the merits, the Court of Appeals departed from the well-established doctrine laid down by this Court that even a private corporation's powers and disabilities are governed by the law of its place of incorporation. *A fortiori,* a governmental agency's powers can only be established by reference to their source. Further, having failed to apply the federal conflicts rule as laid down by this Court, the Court of Appeals made an *ad hoc* ruling in plain conflict with the federal substantive law rule, likewise laid down by this Court, that a government's capacity and authority to contract must be affirmatively proven—not be taken for granted, much less made the subject of presumptions that override uncontradicted evidence of absence of capacity and authority.

(a) The power and capacity of a foreign body corporate are determinable by reference to its own law.

In *Canada Southern R. R.* v. *Gebhard,* 109 U.S. 527 (1883), this Court was called upon to determine the effect to be given to a Canadian statute reorganizing the affairs of a Canadian railroad corporation, which had the effect, *inter alia,* of retroactively impairing obligations of the corporation on a public bond issue. It held the Canadian statute binding upon both the Canadian and American bondholders, stating:

> "That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. * * *
>
> "A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." * * * But wherever it goes for business it carries its charter, as that is the law of its existence, * * * and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. * * * every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes * * *."*

* New York law is to the same effect: *Sliosberg* v. *New York Life Insurance Co.,* 244 N.Y. 482, 155 N.E. 749 (1927).

The House of Lords' decision in *National Bank of Greece and Athens, S. A.* v. *Metliss,* [1958] A.C. 509 (1957), well illustrates general acceptance of this principle in international commerce. There, a Greek statute had amalgamated two existing Greek banks and constituted them as a new bank, naming it as the "universal successor" to the rights and obligations of the amalgamated banks. The new bank (a private entity) was subsequently sued upon bond obligations of one of the two former banks. Greece had also declared a moratorium on all foreign bond obligations. Plaintiff claimed the benefit of the first Greek statute but without accepting the disabilities of the second. The defendant bank argued that since plaintiff itself had invoked the benefit of Greek statutory law, he must accept all of it, including the moratorium. The House of Lords held that, notwithstanding that the proper law of the bonds was English law, in order to determine the liability of the new bank upon the former bank's obligations, English courts should look to the Greek statute constituting it, since the new bank's status, duties, powers, assets and liabilities were created by Greek law and should be determined by reference to Greek law. As to the moratorium, the House of Lords held that since English law, being the proper law of the contract, governed the obligations, the moratorium could properly be disregarded as ineffective to vary an English obligation.

Goodrich summarizes the rule thus:

> "[A] corporation can only do that which it is empowered to do by the law which brings it into existence; 'its capacities and powers are determined by the law which created it.' The capacity of such an artificially created entity is not increased when it contracts in another jurisdiction than that of its

> charter; it is limited in what it may do by the law which created it." Goodrich, Conflict of Laws, § 108, at 208 (4th ed. 1964).

See also: Beale, *Conflict of Laws,* §§ 165.1, 165.3; Dicey & Morris, *Conflict of Laws* (8th ed.), Rule 73, at 484; 36 Am. Jur. 2d, *Foreign Corporations,* §§ 85, 86, 91; 20 C.J.S. *Corporations,* §§ 1800-1809.

The Court of Appeals, while resorting quite unnecessarily to the novel and rather nebulous doctrine of "depeçage" on the De Lyra aspect of this case (18a-19a), refused to consider the effect of Venezuelan public law in determining the power and capacity of a Venezuelan *public* entity; and this in a case where the claimants under the guaranties alleged their credit decisions were made precisely in reliance on the Venezuelan public status of the guarantor. Instead of applying the controlling conflicts rule laid down by this Court, the Court of Appeals, without citation to any authority, ignored the issues of capacity and authority under the law of the jurisdiction of CVF's creation and existence, pointing instead to some undefined "principles of transnational commercial law" (15a). To what extent the Court, in so doing, was engaging in some sort of "depeçage" is unclear; but it is for this Court, we submit, to say how the picking-and-choosing process of "depeçage," if it is to become an accepted part of federal conflict of laws, should serve to replace clear and definite rules in this sensitive area: are legal conflict rules to be overturned or ignored simply so as to satisfy the Court's rough-and-ready notions of equity?

Is it inherently improper for the governmental agency of a friendly foreign power to plead in our Courts that it had no power, under its own published laws, to contract the questioned obligations at all?

(b) Venezuelan law aside, there was no lacuna: the Court should have followed the controlling U.S. federal and state law principle that a governmental agency's contractual obligations must conform to its governing statutes.

Moreover, "depeçage" if that is what the Court of Appeals was invoking, may only be employed, even according to its own proponents, so as to select the rule deemed most desirable for the case from the law of one or more of the jurisdictions with contacts—not so as to disregard *all* rules of *all* jurisdictions possibly concerned.* Here, the Court of Appeals, having read the Venezuelan law out of the transaction entirely, went on to ignore as well the controlling American legal rules in respect of public agents, which differ materially from those governing the acts of private agents. For example, in *Gibbons* v. *United States,* 75 U.S. 269 (1868), this Court stated that:

> "[n]o government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents." (75 U.S. at 454).

Accord: Whiteside v. *United States,* 93 U.S. 247 (1876); *Wisconsin Central R. R.* v. *United States,* 164 U.S. 190 (1896); *Utah Power & Light Co.* v. *United States,* 243 U.S. 389 (1917);** *Rock Island, Arkansas & Louisiana*

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* See, *e.g.*, W. L. Reese, "Depeçage: A Common Phenomenon in Choice of Law," 73 Colum. L. Rev. 58, 60 (1973).

** Recently affirmed by this Court in *United States Immigration & Naturalization Service* v. *Hibi,* 414 U.S. 5 (1973).

R. R. v. *United States,* 254 U.S. 141 (1920); *Wilber National Bank* v. *United States,* 294 U.S. 120 (1935).

In *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380 (1947), a case closely analogous to the present one, this Court reaffirmed the rule. The Federal Crop Insurance Corporation, a wholly Government-owned entity created by statute as an agency of the Department of Agriculture, was empowered to insure wheat producers against unavoidable losses. Implementing regulations prohibited the insurance of spring crops which had been reseeded on winter acreage. An agent of the Corporation mistakenly issued insurance to an innocent farmer in respect of a reseeded crop. The crop was destroyed and the farmer sought to recover from the Corporation, which had disclaimed upon discovering that the destroyed acreage had been reseeded. This Court rejected the farmer's claim, saying, in part:

> " * * * *Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it* * * * Whatever the form in which the Government functions, *anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority* * * *." (332 U.S. at 383) (Emphasis added)

These fundamental principles enunciated by this Court regarding a government's liability upon contracts made by its agents have been consistently followed by the Courts of Appeal and the Court of Claims in their

treatment of claims against the federal government*: *Jackson* v. *United States,* 573 F.2d 1189 (Ct. Cl. 1978); *Yosemite Park* v. *United States,* 582 F.2d 552 (Ct. Cl. 1978); *Putnam Mills Corp.* v. *United States,* 479 F.2d 1334 (Ct. Cl. 1973); *Empire-Detroit Steel Division* v. *Occupational Safety and Health Review Commission,* 579 F.2d 378 (6th Cir. 1978); *Schoenbrod* v. *United States,* 410 F.2d 400 (Ct. Cl. 1969); *In re Hooper's Estate,* 359 F.2d 569 (3rd Cir. 1966).

In line with the universal rule that absent proof of foreign law, the forum will presume it to be the same as the forum's one would have expected that the Appeals Court, having, rightly or wrongly, ignored the Venezuelan rule, would have needs fallen back upon the federal rule, *i.e.* upon *Federal Crop Insurance Corp.* v. *Merrill, supra.* In failing to do so, the Court of Appeals was led in one fell swoop to ignore, in succession, not one but two important legal rules laid down by this Court: the conflicts rule and the substantive rule governing authorization of acts of governmental agents.

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* New York State law is identical. Further, provisions similar to those of the Venezuelan Merchant Marine Law are also found in New York law, under which the State Comptroller's approval is a prerequisite to the validity of contracts made by New York governmental entities. New York State Finance Law § 112; *Belmar Contracting Co.* v. *State of New York,* 233 N.Y. 189, 135 N.E. 240 (1922); *Konski Engineers P.C.* v. *Levitt,* 415 N.Y.S.2d 509 (App. Div. 3d Dept. 1979), *aff'd* 49 N.Y.2d 850 (1980).

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Second Circuit decided July 28, 1980

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 835—September Term, 1979

(Argued March 19, 1980 Decided July 28, 1980)

Docket No. 79-7730

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff-Appellant,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP.,
Defendants-Appellees,

SECURITY PACIFIC INTERNATIONAL BANK,
Defendant,

VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,
Defendants-Appellees,

and

CANADIAN IMPERIAL BANK OF COMMERCE, THE ROYAL BANK OF CANADA INTERNATIONAL LIMITED, BANQUE CANADIENNE NATIONALE, BANQUE PROVINCIALE, LA-SALLE NATIONAL BANK, and AMERICAN SECURITY AND TRUST COMPANY,
Intervening Defendants,

—against—

VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,
Additional Defendant on the Counterclaim by Intervening Defendants,

and

MERBAN INTERNATIONAL, INCORPORATED,
Additional Defendant on the Second Crossclaim by Intervening Defendants.

B e f o r e :

LUMBARD, MULLIGAN and OAKES,
Circuit Judges.

Appeal from a judgment entered in the District Court for the Southern District of New York, Sweet, *J.*, holding that a Venezuelan guarantor was liable on certain notes, that one of the defendants was not liable for fraud, and that the District Court had had subject matter jurisdiction over the case. Affirmed in part, reversed in part, and remanded.

SIRIUS C. COOK, Esq., New York, N.Y. (Healy & Baillie, New York, N.Y., Nicholas J. Healy, Esq., John P. O'Donnell, Esq., of counsel), *for Plain-*

tiff-Appellant Corporacion Venezolana de Fomento.

DAVID HARTFIELD, JR., Esq., New York, N.Y. (White & Case, New York, N.Y., Allan L. Gropper, Esq., Harry G. Barlow, Esq.; Paskus, Gordon & Hyman, New York, N.Y., Robert R. Slaughter, Esq., of counsel), *for Defendants-Appellees, The Merban Corporation, Robert J. Redmond and James E. Himoff.*

ANTHONY LIMITONE, JR., Esq., New York, N.Y. (Thacher, Proffitt & Wood, Edward C. Kalaidjian, Esq., of counsel), *for Defendants-Appellees Vintero Sales Corporation, Vintero Corporation and Vincent A. DeLyra.*

LUMBARD, *Circuit Judge:*

This appeal presents a complex of legal issues arising out of the default by Venezolana de Cruceros del Caribe, C.A. ("Cariven"), a Venezuelan corporation, on notes issued by it and guaranteed by Corporacion Venezolana de Fomento ("CVF"), a Venezuelan governmental entity, and purchased by The Merban Corporation ("Merban"), a Swiss corporation, and later resold in part to various United States and Canadian banks, who became intervenors in this action. CVF alleged in its complaint filed in the Southern District of New York that the guarantees were void both because CVF had never approved them and because CVF had been

fraudulently induced to guarantee the notes by Vintero Sales Corporation and Vintero Corporation, both New York corporations, by Vincent A. DeLyra, a United States citizen and principal in the Vintero companies (all parties to this action, and hereinafter collectively described as "the DeLyra interests"), and by Merban and several of Merban's officers. CVF appeals from the decision of the district court, Sweet, *J.*, rejecting CVF's claims of non-approval and fraud, rendering judgment for Merban on its counterclaims to recover on the guarantees, No. 76-1671 (S.D.N.Y., Feb. 13, 1979) and from the district court's supplemental opinion finding that it had subject matter jurisdiction, 477 F.Supp. 615 (S.D.N.Y. 1979). We affirm this portion of the district court's decision, but reverse and remand insofar as the judgment and opinion below absolves the DeLyra interests of actionable fraud.[1]

In 1974, Cariven sought from CVF—a Venezuelan state agency charged with stimulating economic enterprise—a guarantee for notes it intended to issue in order to finance its first business venture, the purchase and outfitting of two vessels as cruise ships. Cariven's stock was held by two Venezuelan nominees, and the district court found that DeLyra was the "49% owner of the corporation" (along with an associate named Gascue, who is not a party to this litigation) and that DeLyra "consider[ed] himself a joint venturer or perhaps an

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[1] A full statement of the facts in this case can be found in *Corporacion Venezolana de Fomento v. Vintero Sales,* 452 F.Supp. 1108 (S.D.N.Y. 1978), in which Judge Conner granted summary judgment in favor of the intervening purchasing banks. An appeal from this decision was settled by the parties after we remanded the case for a consideration of certain jurisdictional issues identical to those decided in this opinion, *CVF v. Vintero,* et al., No. 78-7304, (2d Cir. June 27, 1979).

undisclosed principal in Cariven." Cariven had no appreciable assets and its principals had no experience running a cruise line. CVF was given the right to nominate two directors to seats on Cariven's board of directors early on in the course of financing negotiations.

Meanwhile, in 1975, as Cariven's arrangements for financing its purchases of the ships progressed, Vintero Sales Corporation bought two ships, the S.S. Santa Rosa and the S.S. Bahama Star. Vintero paid approximately $2 million for the two, most of this sum being money borrowed from Merban, in a loan not involved in this case.

Soon after, Cariven agreed to buy the two ships from Vintero at a combined price of approximately $17 million. The record reveals that although some money was expended by Vintero towards the refurbishing of the ships, less than a million dollars in such expenses was evidenced by receipts.[2]

By early 1975, the financing structure for Vintero's sale to Cariven was in place. Cariven issued and Merban bought two series of notes, one in April, 1975 and the second in October, 1975, each corresponding to one of the two ships to be bought from Vintero with the proceeds. Approximately $12 million of the notes were sold by Merban to various U.S. and Canadian banks ("the purchasing banks"). The money thus raised for Cariven was made available in the form of letters of credit at Security Pacific International Bank ("SPIB") made out in favor of Vintero, which was permitted to

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2 In April, 1979, one of the two ships, the Bahama Star, was sold at a court-ordered auction for $332,000. As part of its Chapter XI proceedings, Vintero Corporation is presently asserting ownership of the other ship involved, the Santa Rosa, and an interest in the proceeds of the Bahama Star. S.D.N.Y. Docket No. 77-B-2687.

make drawdowns according to conditions incorporated in the Merban-Cariven Loan Agreement. Vintero collected about $8 million in this manner.

In April, 1976, Cariven defaulted on its interest payments to Merban and other holders of both series of its notes. No payments of principal or interest on either series have been made since October 30, 1975, when the first payments by Cariven were due.

In 1976, CVF brought suit in the Southern District of New York for a declaratory judgment against Merban and Vintero, seeking judicial nullification of its guarantees on the theory that Cariven had failed to comply with certain conditions precedent to the validity of the CVF guarantees.[3] The purchasing banks intervened and counterclaimed against CVF, and Judge Conner granted them summary judgment against CVF, at the same time denying summary judgment to Merban. 452 F.Supp. 1108 (S.D.N.Y. 1978). The case was then transferred to Judge Sweet, who, after a bench trial on those issues left for resolution in light of Judge Conner's decision, entered judgment as described above. Subsequently, on June 27, 1979, this court remanded to Judge Sweet an appeal from Judge Conner's decision alleging lack of subject matter jurisdiction. The rulings by Judge Conner with respect to the purchasing banks were no longer in

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3 The six conditions precedent to the guarantee asserted by CVF were "(1) that the two ships to be purchased by Cariven have a capacity of 800 passengers each; (2) that a 'ship mortgage' ('prenda naval') on each ship in favor of [CVF] be acquired with funds obtained from the guarantees; (3) that the shareholders of Cariven increase the company's capital of the enterprise to the amount of the guarantee; (4) that the enterprise have available in cash not less than Bs. 2,000,000 (Venezuelan currency) for working capital; (5) that approvals for the transactions be obtained from the Ministry of Communications; and (6) that approvals for the transactions be obtained from the Comptroller-General." 452 F.Supp. at 1113.

issue because a settlement had been reached between CVF and the purchasing banks. On September 20, 1979, Judge Sweet issued a second opinion, in which he found that jurisdiction existed under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602-1611; and under the Edge Act, 12 U.S.C. § 632.

Federal Jurisdiction

The district court initially took jurisdiction on diversity grounds. But in its supplemental opinion on jurisdiction the district court recognized that this basis was insufficient under this circuit's case law. Both Merban, a Swiss corporation, and CVF, a Venezuelan corporation, are aliens. We have held that the presence of aliens on two sides of a case destroys diversity jurisdiction. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Merban, however, has its principal place of business in New York, and since the 1958 amendment to the diversity statute, 28 U.S.C. 1332(c), making corporations citizens of the states in which they have their principal place of business, in addition to the states in which they are incorporated, there has been a question as to whether or not alien corporations possess such dual citizenship. In our most recent comment on the subject, we suggested that alien corporations are not citizens of the state in which they have their principal place of business. *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, n.5 (2d Cir. 1976). We need not reach the issue of whether or not 28 U.S.C. 1332(c) applies to alien corporations, however, because it is enough in this case to hold that, even assuming such dual citizenship, the fact that alien parties were present on *both* sides would destroy complete diversity. *Hercules, Inc. v. Dynamic Export Corp.*, 71 F.R.D. 101 (S.D.N.Y. 1976).

The district court reasoned that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, supplied a basis for federal jurisdiction. We disagree.

The basic purpose of the Foreign Sovereign Immunities Act ("FSIA") is to give the district courts jurisdiction to hear civil cases involving claims against foreign states, and their instrumentalities, which have waived their immunity from suit with regard to the transaction involved. CVF is clearly the kind of governmental instrumentality against which such suits were contemplated, and there can be no gainsaying that this commercial transaction is one in which the government of Venezuela waived its immunity. The sole difficulty with the invocation of the FSIA as a basis for jurisdiction is CVF's argument that the Act was not meant to confer jurisdiction on cases pending at the time the Act became law.

CVF filed this action on April 9, 1976. The FSIA did not become effective until January 24, 1977. Pub. L. 94-583, § 8. Since that time a number of district courts have faced the issue of whether or not to apply the provisions of the Act retroactively. In *Yesenin-Volpin v. Novosti Press Agency,* 443 F.Supp. 849 (S.D.N.Y. 1978), the court decided to apply the substantive principles of immunity embodied in the Act to a case filed before the effective date of the substantive criteria enacted by Congress. Other cases, unlike *Yesenin-Volpin,* have addressed the jurisdiction-conferring aspects of the Act, but in the context of removal statutes, which are construed strictly and involve the necessity of giving weight to the extent to which the action has progressed in the court where it was initially brought, *Martropico et al. v. [Pertamina],* 428 F.Supp. 1035 (S.D.N.Y. 1977); or in context of *in personam* jurisdiction, *National American*

Corp. v. Federal Republic of Nigeria, 448 F.Supp. 662 (S.D.N.Y. 1978); or in a context in which the presence of a grant of interim relief, such as attachment, brought into play the Congressional mandate to leave intact the *status quo ante* January 24, 1977 as respects rights of the parties. *Amoco Overseas Oil Co. v. Com. Nat. Algerienne de Navigation,* 459 F.Supp. 1242 (S.D.N.Y. 1978), *aff'd* 605 F.2d 648; *National American Oil Corp. v. Federal Republic of Nigeria, supra.*

Thus no case in this circuit has squarely addressed the retroactive application of the provision conferring subject matter jurisdiction. The district court relied upon the language of the Act's Preamble which states that "henceforth" cases should be decided in accordance with the principles of the FSIA. But we read this to mean only that decisions made henceforth should be governed by the substantive principles of immunity law adopted in the Act. The Preamble does not purport to say anything about the retroactive application of the Act's subject matter jurisdiction provisions.[4]

This case, then, presents the situation which is the converse of *Ex parte McCardle,* 7 Wall. [74 U.S.] 509

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4 In many cases a resolution of the substantive immunity law issues will be required in order to reach a decision on subject matter jurisdiction, because 28 U.S.C. § 1330 is couched as follows:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Thus a court may have to interpret the substantive principles embodied in §§ 1605-1607 before deciding whether to take jurisdiction. Since CVF has not claimed sovereign immunity in this case, no inquiry into whether or not the substantive principles of §§ 1605-1607 apply is necessary.

(1869). In that case the question was whether or not Congress could withdraw jurisdiction from the district courts in pending cases. *See generally* Hart and Wechsler, "Further Note on the Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic," The Federal Courts and the Federal System (2d Ed.) at 330. Rarely will a court face the question whether or not Congress can *confer* jurisdiction in a pending case, since such a scenario supposes that the district court has taken jurisdiction on a mistaken theory. Such instances are not, however, unknown; and the same situation can be created when a change in the way a jurisdictional statute is interpreted threatens to oust the district courts of jurisdiction. In *Andrus v. Charlestone Stone Products,* 436 U.S. 604, n.6 (1978), the Supreme Court held that a case heard by the district court under an incorrect theory of subject matter jurisdiction could be saved, in a jurisdictional sense, by passage, after the case was begun, of a statute whose effect was to vest the court with jurisdiction. The mechanism in *Andrus* was Congress' elimination of the amount in controversy requirement in suits against the United States or its officers. The Court held that this elimination created jurisdiction retroactively.

But in our view the *Andrus* principle is not broad enough to cover the case at bar. The *Andrus* Court relied on the "remedial purpose" of the elimination of the amount in controversy, and cited with approval a circuit court case in which the same result had been reached on the ground that the elimination of the requirement was a Congressional correction of a "lacuna". *Ralpho v. Bell,* 569 F.2d 607, 615-16, n.51 (D.C. Cir. 1977).

Passage of the FSIA cannot be said to have remedied a "lacuna." Rather, the Act represented Congress' first

codification of principles of sovereign immunity law. We need not reach the troubling question of whether or not Congress can confer jurisdiction in pending cases, and thus further undermine the principle that jurisdiction is determined at the time of commencement of suit, because we cannot agree with the district court's view that Congress intended such retroactivity in the case of the FSIA.

We do find that the District Court had jurisdiction under the Edge Act, 12 U.S.C. § 632, which provides that

> all suits of a civil nature . . . to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking . . . shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits. . . .

Judge Sweet found that the presence in the case of the two intervening American purchasing banks, both federally chartered, sufficed to confer Edge Act jurisdiction. But he did not reach the question as to whether or not Merban's counterclaims against CVF, on which he ultimately gave judgment in favor of Merban, could be considered within the ancillary jurisdiction of the federal court assuming that Edge Act jurisdiction only was present, because in his view jurisdiction over all aspects of the action could also be predicated upon the FSIA. We are troubled by Judge Sweet's approach because the central provision of the jurisdictional grant quoted above is the necessity that the transaction in question be one "arising out of . . . international or

foreign banking." The "international" or "foreign" part of the sale of Cariven's notes was, in essence, a private placement with a financing firm, but not really a banking transaction because neither Cariven nor Merban, nor for that matter CVF, is a bank. Merban's sales of the notes to American and Canadian banks involved "foreign banking" only if a mere sale within the United States to a foreign purchaser (i.e., a Canadian bank) is "foreign banking" within the statute. And, in any event, the intervention by nationally chartered banks could not confer jurisdiction on that part of the case which consists of CVF's claims against Merban, or Merban's against CVF, because the rule that pleadings by intervenors may be treated as independent actions for jurisdictional purposes does not extend to giving the court ancillary jurisdiction over the other parties; or, put in a more familiar way, "intervention will not be permitted to breathe life into a 'non-existent' law suit." *Fuller v. Volk,* 351 F.2d 323 (3d Cir. 1965).

There is, however, another possible basis for Edge Act jurisdiction. SPIB is a nationally chartered bank entitled to the protection offered by 12 U.S.C. § 632. But Judge Sweet thought that, as a mere stakeholder, SPIB was not exposed to any potential liability. Thus, in his view, its presence as a defendant was not sufficient to confer jurisdiction. *Bata v. Central Penn Bank of Philadelphia,* 223 F.Supp. 91 (E.D. Pa. 1963).[5] Judge Sweet relied on

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5 The *Bata* case involved the construction of 12 U.S.C. § 632 insofar as it provides for removal of an action in which a federally chartered bank is a party, and because of the particular strictness with which removal statutes are construed we might not feel compelled to apply *Bata* to a case in which removal was not being sought. But because we cannot agree with the district court that SPIB was a mere stakeholder not threatened by liability we need not reach the question of *Bata's* applicability.

Judge Conner's statement that "the role of Chemical and Security Pacific was that of a depository and collection agent." 452 F.Supp. at 1116. But Judge Conner's opinion dealt with the question of whether or not the purchasing banks were holders in due course under the U.C.C., and his discussion of the status of SPIB is limited to its role as custodian of the actual notes sold by Merban to the purchasing banks. SPIB played another role in the Cariven-Merban transaction—that of the provider of a letter of credit for Vintero's benefit on Cariven's account. SPIB was named in CVF's complaint as a defendant who, allegedly, had wrongfully allowed drawdowns by Vintero against the letter of credit—drawdowns which were wrongful because of Vintero's alleged failure to comply with what CVF said were conditions precedent on the money's availability binding on SPIB. CVF's complaint clearly viewed SPIB as potentially liable for damages. SPIB is a federally chartered bank, and the transaction in which Vintero, in New York, drew on a letter of credit on the account of a Venezuelan corporation, Cariven, was one involving "international or foreign banking." SPIB was thus a true party to the action, and jurisdiction inhered in the district court under 12 U.S.C. § 632.[6] The counterclaims

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6 Although CVF did not allege Edge Act jurisdiction in its complaint, the existence of such jurisdiction appears from the facts alleged in the complaint. *See Harary v. Blumenthal,* 555 F.2d 1113, 1115 n.1 (2d Cir. 1977).

CVF's complaint alleged that SPIB was a New York corporation. In fact, as the district court found, 477 F.Supp. at 621, SPIB at the time the complaint was filed was chartered under the laws of the United States. And courts look at "the record viewed in its collective significance," *Yonofsky v. Wernick,* 362 F.Supp. 1005, 1016 (S.D.N.Y. 1973), to resolve matters of underlying jurisdictional issues. This is particularly true when the jurisdictional issue is one that, unlike, for example, domicile or amount in controversy, is a matter easily determined by documents and one as to which there will usually

by Merban and the claims by the intervenors were within the district court's ancillary jurisdiction. This jurisdiction was not defeated when SPIB settled and was consensually dismissed from the case.

Merban's Counterclaims Against CVF

CVF appeals from Judge Sweet's grant of judgment on the merits in favor of Merban on the guarantees. We affirm.

CVF alleges that Cariven agreed to a series of conditions precedent to CVF's issuance of the guarantees, and that these conditions were not complied with. As Judge Conner correctly held in an earlier decision in this case, 452 F.Supp. 1108 (S.D.N.Y. 1978), all but one of these purported conditions were, at most, side agreements between CVF and Cariven. With this one exception, they were not incorporated, directly or by reference, into the Cariven-Merban loan agreement. Merban is not bound by side agreements between Cariven and CVF, at least in the absence of any finding by the district court that Merban knew about such agreements. There is nothing in the nature of CVF's status as a governmental entity that should change this result. CVF argues that under Venezuelan law the CVF guarantees are a legal nullity. But if this contention is true, it is a matter for the Venezuelan authorities to take up with CVF, or for CVF to take up with Cariven in the courts of Venezuela. The validity of a guarantee relied

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be an unequivocal answer. The evidence we rely on here is the same sort of evidence that would be considered in the form of affidavits and other papers if the district court had been presented with an FRCP Rule 12(b)(1) motion, a procedure we have approved. *Exchange National Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976).

upon in international commercial transactions cannot be governed solely by the internal public law of the guarantor's home country without reference to established principles of transnational commercial law.

The only ground asserted by CVF which could nullify the guarantees is the purported insufficiency of the approval of the Venezuelan Comptroller-General, because such approval is required by the terms of both Merban-Cariven loan agreements. Only one letter of approval from the Comptroller-General was in fact obtained. Judge Sweet reasoned that this document could satisfy the terms of both Loan Agreements, since it referred to "two ships."

Before determining whether or not Judge Sweet's conclusion was correct as a matter of law, we must determine what law to apply. So far as the first loan agreement is concerned, there is little problem. It contains a choice of law clause naming New York law as governing. Since there were considerable contacts with New York, we see no obstacle to giving effect to this clause. And since CVF makes no argument that the Comptroller-General's approval was insufficient under New York law, but rather argues only that it would be insufficient if Venezuelan law governed, we affirm Judge Sweet's conclusion that the terms of the first Loan Agreement were complied with and the guarantees issued pursuant to them were valid.

Analyzing the sufficiency of the Comptroller-General's approval of the second loan guarantee is more difficult, since the second Loan Agreement contains no choice-of-law provisions. Cariven, a Venezuelan corporation, borrowed money from a Swiss corporation with a principal place of business in New York. The notes were delivered to Merban in New York, and it was in New

York that Merban paid to CVF the latter's commission on its guarantees. Although conflicting inferences could be drawn from the presence of the choice-of-law clause in the first Loan Agreement and its absence from in the second, there is nothing in the record to support the view that it was eliminated as a bargained-for matter. We conclude that the parties intended New York law to apply to the second loan agreement as well, and, as stated above, under New York law there seems to be no substantial doubt that the approval obtained from the Venezuelan Comptroller-General is sufficient to validate the guarantees made with respect to the second series of notes.

As an additional reason why Merban should not be awarded recovery on the CVF guarantees, appellants argue that the district court erred in finding that no fraud was committed on CVF in order to induce it to issue the guarantees, and in finding that Merban did not participate in such fraud. We agree with the district court on the issue of Merban's participation. There is abundant evidence in the record to support its view that Merban's officers were unaware of DeLyra's machinations. The fact that DeLyra himself on occasion acted as a business locater for Merban is not sufficient to justify imputing any wrongdoing on his part to Merban, since his relationship to Merban was that of an independent agent. He was not a stockholder, officer or employee of Merban, and his actions, if fraudulent with respect to CVF, cannot be imputed to Merban.

But we do not see why the district court had to reach the question of whether or not DeLyra's involvement in the scheme constituted actionable fraud, and we vacate that portion of the district court's opinion which holds that no such fraud occurred because the element of

reliance was missing from the transaction.[7] The fact that, as we have found, the Loan Agreements were complied with by Merban and that Merban did not participate in any fraud perpetrated upon CVF, is sufficient basis on which to affirm CVF's liability to Merban.

Judge Sweet reasoned that CVF could not show reliance with respect to any fraud by DeLyra because (1) it had placed two CVF directors on Cariven's board, and thus had the opportunity to secure information independently on such matters as whether Cariven's principals had made the additional capital contributions required of them by agreements between CVF and Cariven; and (2) because CVF could not prove it had received letters from Cariven in which alleged misrepresentations were contained. We question whether Judge Sweet's interpretation of the New York law on reliance was correct. The fact that an entity is represented on a board of directors will not prove an absolute bar to proof of reliance when the controlling directors take steps to prevent the outside directors from exercising their normal functions of review and oversight. *See Frigitemp Corp. v. Financial Dynamics Fund,* 524 F.2d 275 (2d Cir. 1975).

But the ground for our reversal is that Judge Sweet applied the wrong law. Certain aspects of this trans-

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[7] It may be that, in addition to dealing with CVF's claim that it was not liable on the guarantees because of Merban's involvement with the DeLyra interests in the alleged fraud, the district court thought it had to reach the question of fraud in order to rule on CVF's claim that it was entitled to an indemnity from Cariven's stockholders. The agreement between CVF and Cariven providing for such an indemnity ran against Cariven's stockholders, who were mere nominees. In light of the district court's finding that DeLyra was a principal or joint venturer in Cariven, it is possible that DeLyra might be liable under the indemnity agreement. To the extent the district court's decision below purports to foreclose such liability, which is unclear, it is reversed.

action, such as the sufficiency of the Comptroller General's approval, are governed by New York law. This does not mean, as the district court apparently assumed, that New York law governs related issues, such as CVF's allegation that it was defrauded by the DeLyra interests. Using the choice of law technique of *depecage,*[8] a court may—and in this case we think should have—separated this part of this case into two different portions for choice of law purposes. The first portion is the question of what law to apply to the question of the sufficiency of the Comptroller General's telegram as an approval under the Loan Agreements. Since there are enough contacts with New York to validate the parties' choice of New York law as governing under any choice of law analysis, we need not reach the question of what jurisdiction's law would be applied if a serious challenge to the parties' ability to choose New York law could be mounted. Analysis is more difficult with respect to choice of law for the CVF-DeLyra fraud issues. Were this a diversity case, *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.,* 313 U.S. 487 (1941), would require that we look to the choice of law doctrines of the forum state. This is a federal question case, however, and it is appropriate that we apply a federal common law choice of law rule in order to decide which of the concerned jurisdiction's substan-

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8 "Depecage occurs where the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate the other issues. The technique permits a more nuanced handling of certain multistate situations and thus forwards the policy of aptness. *See generally* Reese, Depecage: A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58 (1973)." Von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347 (1974). *See also Pearson v. Northeast Airlines, Inc.,* 309 F.2d 553 (2d Cir. 1962) (en banc).

tive law of fraud (*i.e.*, that of New York or that of Venezuela) should govern. The use of federal common law in specialized areas where jurisdiction is not based on diversity has been sanctioned by the Supreme Court since the day *Erie* was decided, *see Hinderlider v. LaPlata River Co.*, 304 U.S. 92 (1938); and the availability of a federal choice of law rule in a case like this, where jurisdiction is based on a statute meant to give a federal forum to nationally chartered banks, is supported by *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

In this case we think that the question of whether or not CVF was defrauded by the DeLyra interests is one best resolved under Venezuelan law. Unlike the validity of the guarantees, the resolution of this question has no repercussions in the world of international commercial transactions. It involves no choice of law decision made by the parties. Instead, it calls for a determination whether or not a Venezuelan corporation, Cariven (or its two principals, one of whom, Gascue, is Venezuelan) defrauded a second Venezuelan corporation, CVF, in Venezuela. The alleged fraud, moreover, concerned acts that were to take place in Venezuela and be of Venezuelan legal significance (*e.g.*, the increased capital contributions, the Ministry of Communications approval, and the securing of a "prenda naval", a civil law ship mortgage). Such allegations, in our view, should be evaluated under Venezuelan rather than New York law.

Because the district court thought that the fraud claim against the DeLyra interests was governed by New York law insofar as CVF sought to impose liability on the DeLyra interests in addition to negating CVF's guarantees, the district court did not resolve certain questions of fact and law (such as DeLyra's possible personal liability

under the CVF-Cariven indemnity contract, *see* n.7 *supra,* and the sufficiency of proof of fraud under Venezuelan law). Accordingly, we direct a remand for the consideration of these and other issues connected with the resolution of CVF's claim of fraud against the DeLyra interests.

Affirmed in part, reversed in part, and remanded.

Opinion of the District Court entered September 20, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1671 (RWS)

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff,

vs.

VINTERO SALES CORPORATION, *et al.*,
Defendants,

and

CANADIAN IMPERIAL BANK OF COMMERCE, *et al.*,
Intervening Defendants,

and

VENEZOLANA DE CRUCEROS DEL CARIBE, CA.,
Additional Defendant on the Counterclaim by Intervening Defendants

and

MERBAN INTERNATIONAL, INC.,
Additional Defendant on the Second Crossclaim by Intervening Defendants.

Opinion

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SWEET, *D.J.*

Plaintiff Corporacion Venezolana de Fomento ("CVF"), after losing on its own claims and on defendants' counterclaims, now challenges this court's jurisdiction over the subject matter and seeks dismissal of the action pursuant to Fed.R.Civ.P. 12(h)(3).

The facts underlying this dispute are set forth by the Honorable William C. Conner in *Corporation Venezolana de Fomento v. Vintero Sales Corp.*, 452 F.Supp. 1108 (S.D.N.Y. 1978) and may be summarized as follows. CVF is a corporation wholly owned by the Venezuelan government, which gives financial backing, in the form of guarantees, to projects designed to stimulate Venezuelan economic development. Defendant, the Merban Corporation ("Merban"), is a Swiss corporation doing business in New York, which purchases debt instruments issued or guaranteed by financial institutions or governmental entities. All other corporate defendants have their principal places of business in New York and all individual defendants are citizens of New York.

Originally, CVF sought a declaratory judgment as to the validity of guarantees made by CVF on two loan agreements between Merban (the lender) and Venezolana de Cruceros Del Caribe ("Cariven") (the borrower). Merban, and six intervening Canadian and American banks which purchased participating interests in the guaranteed notes issued in connection with the loan agreements, asserted that the loans were in default and counterclaimed for the award of principal and interest. Judge Conner granted summary judgment for the intervening banks, finding them holders in due course and not subject to the defenses asserted against the other defendants. 452 F. Supp. at 1120. After a bench trial on the remaining issues, this court[1] found that CVF's allegations of fraud had not been proven, and that Merban was entitled to recover because the notes and

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1 After summary judgement was granted for the intervening defendants, the case was transferred to this court for trial.

CVF's guarantees were valid obligations enforceable according to their terms. *Corporation Venezolana de Fomento v. Vintero Sales Corp.*, No. 76-1671 (S.D.N.Y. Feb. 13, 1979).

CVF appealed Judge Conner's decision, and thereafter sought dismissal of the entire action on the grounds that federal jurisdiction was improvidently granted. The issue of subject matter jurisdiction was not raised previously, although it was assumed throughout the action that jurisdiction was based on diversity of citizenship. *See Corporation Venezolana de Fomento v. Vintero Sales Corp.*, No. 76-1671, slip op. at 1 (S.D.N.Y. Feb. 13, 1979); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1110 (S.D.N.Y. 1978).[2] Accordingly, the Second Circuit then remanded the case to this court for consideration of that issue. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, No. 78-7304 (2d Cir. June 27, 1979).

Upon more careful consideration, it appears that there is no diversity of citizenship in this case. This court does have jurisdiction over the subject matter of the action, however, because the defendants' counterclaims arise under the Foreign Sovereign Immunities Act and under the Edge Act.

A. Diversity Jurisdiction

The district court has original jurisdiction over actions between citizens of a state and citizens of a foreign state. 28 U.S.C. § 1332(a)(2). It does not, however, have jurisdiction over actions between aliens, *Hodgson v.*

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2 CVF alleged in its complaint that Merban was a New York corporation with its principal place of business in New York, and that there was diversity between the parties in accordance with 28 U.S.C. § 1332. Merban's answer later revealed that it is a Swiss corporation qualified to do business in New York.

Bowerbank, 5 Cranch 303 (1809); *ITT v. Vencap, Ltd.,* 519 F.2d 1001, 1015 (2d Cir. 1975), even if the aliens are from different countries. 1 *Moore's Federal Practice* ¶ 0.75 [1.-2] (2d ed. 1979). Similarly, a lack of complete diversity will defeat jurisdiction if an alien sues a citizen of a state and another alien. *See ITT v. Vencap, Ltd., supra;*[1] *Moore's Federal Practice, supra.*

Defendants note that under 28 U.S.C. § 1332(c), a corporation is deemed a citizen both of the state by which it has been incorporated and of the state in which it has its principal place of business. They contend that this section applies to alien as well as domestic corporations, and indeed, some courts have adopted that view. *See, e.g., Arab International Bank & Trust Co. v. National Westminster Bank, Ltd.,* 463 F. Supp. 1145 (S.D.N.Y. 1979); *Jerro v. Home Lines, Inc.,* 377 F. Supp. 670, 672 (S.D.N.Y. 1974); *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.,* 358 F. Supp. 1001, 1005-07 (N.D. Ill. 1973). From this premise they argue that since Merban is both a citizen of Switzerland and of New York, diversity of citizenship between the parties exists under 28 U.S.C. § 1332(a)(2).[3]

There is, however, substantial authority against the view that section 1332(c) applies to alien corporations. *See e.g., Tsakonites v. Transpacific Carriers Corp.,* 246 F. Supp. 634 (S.D.N.Y. 1965), *aff'd,* 368 F.2d 426 (2d Cir.), *cert. denied,* 386 U.S. 1007 (1967); *Chemical Transp. Corp. v. Metropolitan Petroleum Corp.,* 246 F. Supp. 563 (S.D.N.Y. 1964); *Mazzella v. Pan Oceanica A/S Panama,* 232 F. Supp. 29 (S.D.N.Y. 1964); *Eisenberg v. Commercial Union Assurance Co.,* 189 F. Supp. 500, (S.D.N.Y. 1960). *See also Clarkson Co., Ltd.*

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3 This argument further assumes that Merban has its principal place of business here. Although Merban's answer reflects that its principal place of business is here, CVF now disputes that assertion.

v. Shaheen, 544 F.2d 624 n.5 (2d Cir. 1976) (indicating that alien corporations are "probably deemed to be citizens exclusively of [their home country] for diversity purposes"). In addition, even if § 1332(c) applies to alien corporations, it should be interpreted as it is for domestic corporations, *i.e.,* to preclude corporations with "dual citizenships" from alleging only one of its citizenships in order to meet the diversity requirement. 1 *Moore's Federal Practice* ¶ 0.77 [2.-1]. Most of the cases that have applied § 1332(c) to alien corporations have adopted this approach. *See, e.g., Jerro v. Home Lines, Inc., supra* and *Southeast Guaranty Trust Co. v. Rodman and Renshaw, Inc., supra,* (finding no diversity of citizenship in actions between alien corporation having its principal place of business in a state and a citizen of the same state).

In *Bergen Shipping Co. v. Japan Marine Serv., Ltd.,* 386 F. Supp. 430 (S.D.N.Y. 1974), an exception to this trend, the court in dictum indicated that section 1332(c) may be used by an alien corporation with its principal place of business in New York to create diversity jurisdiction in an action against another alien. *Id.* at 433-34. The court found that Congress, in enacting section 1332(c), sought to eliminate the evil whereby a local institution could bring its litigation into federal court simply because it was incorporated in another state. In view of that policy, the court reasoned that any corporation with its principal place of business in a state should be deemed a citizen of that state. No consideration apparently was given as to why an alien corporation could selectively allege only one citizenship when a domestic corporation could not.

Subsequently in *Hercules Incorporated v. Dynamic Export Corporation,* 71 F.R.D. 101 (S.D.N.Y. 1976), diversity jurisdiction was found lacking where both

parties were aliens, even though one of the aliens had its principal place of business in New York. In *Hercules,* the court noted:

> The statute [§ 1332(c)] creates a principal of dual citizenship, not one of alternative citizenship. Thus, where a corporation is incorporated in state A and has its principal place of business in state B and the adverse party is a citizen of either A or B, diversity is lacking. . . . Likewise, assuming *arguendo* that § 1332(c) is applicable to alien corporations, when an alien corporation with its principal place of business in state A is adverse to either an alien or a citizen of state A, diversity would be lacking. *Id.* at 107 (citations omitted).

Accord Torres v. Hartford Ins. Co., 588 F.2d 848, 850 (1st Cir. 1978). This result is consistent with the underlying purpose of section 1332, which is to restrict federal jurisdiction, *see* S. Rep. No. 1830, 85th Cong., 2d Sess. (1958); H. Rep. No. 1706, 85th Cong., 2d Sess. (1958), and will be here adopted. No jurisdiction exists under 28 U.S.C. § 1332.

B. Federal Question Jurisdiction

At the time this action commenced, no alternative bases of subject matter jurisdiction were alleged. The intervening defendants now seek to amend their pleadings to assert federal question jurisdiction. They rely on 28 U.S.C. § 1653, which allows amendment of the pleadings to cure defective allegations of jurisdiction at various stages of the action. *See* 6 Wright and Miller, *Federal Practice and Procedure* § 1474 at 378 (1972).[4]

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4 28 U.S.C. § 1653 provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

Section 1653 usually is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction exists. *See Tatum v. Laird,* 444 F.2d 947, 952 n.8 (D.D.C. 1971); *Cox v. Livingston,* 407 F.2d 392, 393 (2d Cir. 1969); *John Birch Society v. National Broadcasting Co.,* 377 F.2d 194, 198 (2d Cir. 1967). Without mentioning section 1653, the courts have also allowed amendments that change the entire theory of subject matter jurisdiction upon which the parties rely.[5] *See, e.g. Shows v. Harber,* 575 F.2d 1253 (8th Cir. 1978) (permitting amendment to allege essentials of diversity jurisdiction after finding insufficient basis for admiralty or maritime jurisdiction); *Adekalu v. New York City,* 431 F. Supp. 812 (S.D.N.Y. 1977) (permitting amendment to allege diversity jurisdiction after dismissal of federal claim for failure to state a cause of action). Such amendments may even be allowed to assert alternative grounds of jurisdiction after the circuit court has remanded an action to the district court for a determination as to whether subject matter jurisdiction exists. *See Eisler v. Stritzler,* 535 F.2d 148, 152-53 (1st Cir. 1976). *See also International Ladies' Garment Workers' Union v. Donnelly Garment Co.,* 121 F.2d 561 (8th Cir. 1941).

Here, leave to amend the pleadings to allege different bases of subject matter jurisdiction will be granted if it is shown that jurisdiction exists under any other theory of

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5 Section 1653 does not, by its terms, necessarily allow amendments to allege new theories of subject matter jurisdiction. The language of that section is more specific than that of Fed.R.Civ.P.15(a), which provides for amendment of the pleadings. The cases do not reveal a conflict between the two, however, *see* 6 Wright and Miller, *Federal Practice and Procedure* § 1474 at 378, and some courts have relied solely on Rule 15(a) to permit amendments to cure deficient statements of subject matter jurisdiction. *Id.*

subject matter jurisdiction.[6] Significant time and expense already have been expended by the parties and the court to adjudicate the issues; relitigation would not serve the interests of justice if the court has subject matter jurisdiction.

1. *Jurisdiction Under the Foreign Sovereign Immunities Act*

Defendants assert that this court has jurisdiction over its counterclaims under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1978). The Immunities Act added section 1330 to Title 28 of the United States Code to provide the district courts with subject matter and personal jurisdiction over nonjury civil actions that involve claims against foreign states with respect to which they are not entitled to immunity.[7] "Foreign state" includes any corporate entity, a majority of whose shares is owned by a foreign state. *See* 28

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6 The fact that defendants, rather than CVF, seek to amend the pleadings is not a bar to such amendments. This situation is distinguishable from *McRae v. Arabian American Oil Co.*, 293 F. Supp. 844, 847 (S.D.N.Y. 1968), in which the court would not allow defendant to amend its answer to assert jurisdiction because it believed that § 1653 refers only to the complaint. In the case at bar, defendants are asserting counterclaims which may be within the court's jurisdiction to hear, regardless of the fate of the main action. In addition, defendants in other contexts have been allowed to amend the pleadings under § 1653 in order to show that jurisdiction exists. *See* 6 Wright and Miller, *Federal Practice and Procedure* § 1474 at 379 (1978).

7 Section 1330(a) of Title 28 provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

U.S.C. § 1603(b).[8] Because CVF is a corporation organized under the laws of Venezuela, whose capital stock is wholly owned by the Republic of Venezuela, a claim against it by Merban and the intervening banks confers subject matter jurisdiction on this court unless barred by sovereign immunity.[9]

The original action was commenced on April 9, 1976, nine months before the effective date of the Act. In *Yessenin-Volpin v. Novosti Press Agency,* 443 F. Supp. 849 (S.D.N.Y. 1978), the Immunities Act was held applicable to a suit pending in the court before the effective date of the Act. *See also National American Corp. v. Fed. Republic of Nigeria,* 448 F. Supp. 622, 639 (S.D.N.Y. 1978). The court noted that the preamble to the Act states:

> Claims of foreign states to immunity *should henceforth be decided* by the courts of the United States and of the States in conformity with the principles set forth in this chapter. 28 U.S.C. § 1602 (emphasis in original).

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8 "Foreign state" is defined in 28 U.S.C. § 1603(a) as an agency or instrumentality of a foreign state as defined in subsection (b). Section 1603(b) defines "agency or instrumentality" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

9 It is undisputed that CVF never claimed and is not entitled to immunity in this case. Because it did not raise a defense of sovereign immunity in its responsive pleadings, it implicitly waived a defense of sovereign immunity. *See* H. Rep. No. 1487, 94th Cong., 2d Sess. at 18 (1976). *See also* 28 U.S.C. § 1607(b) (no immunity for counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state").

It also relied upon the fact that application of the Act "will give effect to the congressional intent and will not interfere with the antecedent rights of the parties." *Id.*

These cases, like the case at bar, are distinguishable from the other decisions in this district in which the Act was not applied retroactively. In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation,* 459 F. Supp. 1242 (S.D.N.Y. 1978), *aff'd,* No. 79-7135 (2d Cir. July 19, 1979), a jurisdictional attachment which had been validly obtained prior to the passage of the act would have been invalidated by its application, causing the antecedent rights of the parties to be adversely affected. In *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina),* 428 Supp. 1035 (S.D.N.Y. 1977) and *Rasu Maritama S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina),* No. 77-263 (S.D.N.Y. March 7, 1977), retroactive effect was not given to provisions of the Act to permit removal of actions commenced in state court. As Judge Goettel noted, these cases turned "on the strict construction given removal statutes and the inadvisability of permitting removal of all cases pending on the effective date of the Act without regard to how far the proceeding had progressed." *National American Corp. v. Federal Rep. of Nigeria, supra* at 638.

This action, however, has progressed to its conclusion and the antecedent rights of the parties will not be affected adversely by retroactive application of the Act.[10]

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10 CVF can hardly claim that it is deprived of its right to stay out of federal court when it is the party which attempted to have this court adjudicate the matter to begin with. In this regard, *see Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation,* No. 79-7135, slip op. at 3875-76 n.5 (2d Cir. July 19, 1979), which cites *National American Corp. v. Federal Republic of Nigeria, supra,*

CVF contends that there has been no claim of sovereign immunity in this action and that therefore the Act in this instance is not applicable. In the absence of the exceptions noted above and any adverse effect on any antecedent rights, logical construction of the Act requires consistent application of retroactivity even though CVF has chosen not to assert an immunity defense. Section 1605(a) of Title 28 specifically provides that a foreign state shall not be immune from the jurisdiction of courts of the United States in cases in which the foreign state has waived its immunity either explicitly or by implication.[11] In addition, the House Report to the bill states that the purpose of the Immunities Act is both to provide when and how parties can maintain lawsuits against foreign states as well to provide when foregn states are entitled to immunity. *See* H.R. No. 1487, 94th Cong., 2d Sess. at 6-7 (1976).

The Immunities Act therefore confers jurisdiction over the counterclaims of Merban and the intervening banks, since they constitute claims against a foreign state. Even though Merban's compulsory counterclaim was initially brought in response to CVF's claims, because there is a separate basis of federal jurisdiction, the counterclaim may be allowed to proceed without regard to the fate of the main claim. *Ferguson v. Eakle,* 492 F.2d 26, 28 n.6

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with approval and notes that "[t]here retrospective application of the immunities Act *expanded* jurisdiction and did not interfere with antecedent rights" (emphasis in original).

11 28 U.S.C. § 1605(a) states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of waiver.

(3rd Cir. 1974); *National Research Bureau, Inc. v. Bartholomew,* 482 F.2d 386, 389 (3d Cir. 1973); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 452 F. Supp. 1108, 1110 (S.D.N.Y. 1978); *Rare Earth, Inc. v. Hoorelbeke,* 401 F. Supp. 26, 34-35 (S.D.N.Y. 1975); 6 Wright and Miller, *Federal Practice and Procedure* § 1414 at 80 (1972). Similarly, the banks' claims may be decided because a third party action that is supported by an independent basis of subject matter jurisdiction may be adjudicated even after the dismissal of the main action for lack of jurisdiction. *See Rare Earth, Inc. v. Hoorelbeke,* 401 F. Supp. 26, 35 (S.D.N.Y. 1975); 6 Wright and Miller, *Federal Practice and Procedure* § 1444 at 237 (1972); 3 *Moore's Federal Practice* ¶ 14.26 at 14-533 (2d ed. 1979).

2. *Jurisdiction Under the Edge Act*

Defendants also assert that subject matter jurisdiction over this action is conferred by 12 U.S.C. § 632, which provides:

> Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking . . . or out of other international or foreign operations . . . shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have jurisdiction of all such suits.

The intervening banks allege that this court has jurisdiction over the action because Security Pacific International Bank (Security Pacific), a bank organized

under the laws of the United States, was an original defendant in this action. Security Pacific was named in the action because Merban opened irrevocable letters of credit with Security Pacific for the account of Craiven, and Security Pacific issued certificates of participation to the intervening banks, transferring ownership in the notes to the extent of the interest purchased. On July 25, 1977, Security Pacific was dismissed from the action by stipulation of the parties.

Judge Conner found that the role played by Security Pacific in this affair was simply that of depository and collection agent. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. at 1116. According to the terms of the certificates it issued, its duties and liabilities were limited to presenting the notes for collection at maturity and accounting for the amount received for the notes.[12] Consequently, Security Pacific was subject to no apparent liability for CVF's claim.

Mere stakeholders or escrow agents which are not subject to liability in the lawsuit, are not real parties to

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12 The certificates issued by Security Pacific to each American bank states:

> Subject to the terms and conditions of the Notes and further subject to [Security Pacific] having received from the Maker funds sufficient to pay the entire face amount of each Note, the amounts due in respect of each Participation shall be payable upon presentation of this Certificate at the aforesaid office of [Security Pacific].
>
> * * * * *
>
> [Security Pacific] shall have no duty, liability or responsibility in any capacity (whether of agency, trust or otherwise) to the Participant or any other person except to present the Notes for collection at maturity and account to the Participant to the extent of its Participation for amounts received by [Security Pacific] in respect of the Notes and no other duty, liability or responsibility shall be inferred or implied.

the action, and their presence does not provide a basis for jurisdiction. *See Bata v. Central Penn National Bank of Philadelphia,* 223 F. Supp. 91 (E.D. Pa. 1963); *Chase National Bank of New York v. Directorate General,* 95 F. Supp. 733 (S.D.N.Y. 1959). Accordingly, a party whose role in a lawsuit is merely that of a depository or stakeholder is to be classified as a nominal party. *Armstrong Cover v. Whitfield,* 418 F. Supp. 972 (N.D. Ga. 1976). Since Security Pacific was merely a depository and collection agent, and not potentially liable in this action, its brief presence in the action did not confer jurisdiction under 12 U.S.C. § 632.

Defendants also contend that the intervention as of right in the suit by the American banks, both of which are corporations organized under the laws of the United States, also vests the court with jurisdiction under 12 U.S.C. § 632. Although Judge Conner originally viewed these counterclaims as ancillary[13] to the claims asserted by Merban against CVF, *Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 452 F. Supp. at 1110 n.1, it appears that these claims also confer on this court jurisdiction over the subject matter. The transactions

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13 The term "ancillary" or "ancillary jurisdiction" describes those claims that are so closely related to the main claim that the court will adjudicate them regardless of the absence of a separate basis of subject matter jurisdiction. *See* Wright and Miller, *Federal Practice and Procedure:* Jurisdiction § 3523 (1975). "Pendent jurisdiction" permits a plaintiff, in appropriate circumstances, to join with his federal claim a related state claim over which the court has no independent basis of subject matter jurisdiction. *See* Wright and Miller, *supra* at § 3567 (1975). The doctrines of ancillary and pendent jurisdiction are distinguishable in that pendent claims are asserted by plaintiffs in their complaints and ancillary claims usually are asserted after the complaint is filed by one other than the plaintiff. *See* Aldinger v. Howard *and Pendent Jurisdiction,* 77 Colum.L.Rev. 127, 128 n.5 (1977).

underlying this cause of action "have a distinctly international flavor," 452 F. Supp. at 1111,[14] and the intervening banks are parties with real interests in this action, unlike Security Pacific.

As a general rule, intervention will not serve as a means of conferring jurisdiction on an action. 3B *Moore's Federal Practice* ¶ 24.16[2] at 24-612 (2d ed. 1979). A court may, however, treat the pleadings of an intervenor as a separate action in order to adjudicate the claims raised by the intervenor. *See Miller & Miller Auctioneers, Inc. v. G.W. Murphy Industries, Inc.*, 472 F.2d 893, 895 (10th Cir. 1973); *Atkins v. State Bd. of Ed.*, 418 F.2d 874 (4th Cir. 1969); *Fuller v. Volk*, 351 F.2d 323, 328-29 (3rd Cir. 1965); *In re Raabe, Glissman & Co.*, 71 F. Supp. 678 (S.D.N.Y. 1947); 7A Wright & Miller, *Federal Practice and Procedure* § 1917 (1972). This discretionary procedure is properly utilized here to

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14 It is hard to imagine a factual situation that better describes "transaction including international or foreign banking" or "international or foreign operations" than the case at bar. As Judge Conner noted:

> The loan agreements in issue in this case—one executed on April 30, 1975 (the "April Agreement") and the other on October 15, 1975 (the "October Agreement")—have a distinctly international flavor. The parties thereto are defendant The Merban Corporation ("Merban") (the lender), a Swiss corporation with its principal place of business in New York; Venezolana de Cruceros del Caribe, C.A. ("Cariven") (the borrower), a Venezuelan corporation with its principal place of business in Caracas, Venezuela; and plaintiff Corporacion Venezolana de Fomento ("CVF") (the guarantor), a Venezuelan corporation wholly owned by the government of Venezuela and organized to help obtain financing for new industry. The purpose of the loans was to finance Cariven's purchases of two vessels, the S.S. Santa Rosa and the S.S. Santa Paula, from a New York corporation with its principal place of business in New York, defendant Vintero Sales Corporation ("Vintero") (the seller).
>
> 452 F. Supp. at 1111.

establish jurisdiction over the counterclaims of the American banks against CVF because failure to adjudicate the claim will result only in unnecessary delay and needless litigation in another forum. *See Fuller v. Volk, supra* at 29.[15]

Conclusion

Having concluded as stated above that this court had jurisdiction to consider the claims of all of the defendants, it is necessary to consider the fate of CVF's claims. At this point, CVF's claims take on the appearance of compulsory counterclaims under Fed.R.Civ.P. 13(a), because they arise out of the transaction or occurrence that is the subject matter of the opposing party's claim.[16] Any claim that is logically related to another claim that is being sued upon is properly the basis of a compulsory counterclaim. 3 *Moore's Federal Practice* ¶ 13.13 (2d ed. 1979). Consequently, CVF's claims against the defendants are compulsory counterclaims, and as such, invoke the court's ancillary jurisdiction. *See Moore v. New York Cotton Exchange,* 270 U.S. 593, 46 S.Ct. 367 (1926).

Because defendants' claims were properly before this court and because these claims have been fully litigated, defendants' counterclaims are deemed amended to assert federal question jurisdiction, and CVF's motion to dismiss is denied.

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15 *Cf. Hackner v. Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941) (adding plaintiff after dismissal of original plaintiffs and allowing continuation of action to avoid delay and expense of a new suit).

16 Alternatively, even if CVF's claims are not viewed as compulsory counterclaims, its claims for declaratory relief have, in effect, been decided by the decisions for the defendants, and are barred in the future by the doctrine of *res judicata.*

IT IS SO ORDERED:

ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
September 20, 1979

Order and Judgment of the Second Circuit entered June 27, 1979, remanding to the District Court

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
HONORABLE MURRAY I. GURFEIN

Circuit Judges.

78-7304

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff-Appellant,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP., SECURITY PACIFIC INTERNATIONAL BANK, VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,
Defendants,

—and—

CANADIAN IMPERIAL BANK OF COMMERCE, THE ROYAL BANK OF CANADA INTERNATIONAL LIMITED, BANQUE CANADIENNE NATIONALE, BANQUE PROVINCIALE, LA-

SALLE NATIONAL BANK, and AMERICAN SECURITY AND TRUST COMPANY,

Intervening Defendants-Appellees,

—against—

VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,

Additional Defendant on the Counterclaim by Intervening Defendants,

—and—

MERBAN INTERNATIONAL, INCORPORATED,

Additional Defendant on the Second Crossclaim by Intervening Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the case is REMANDED to said district court to consider the issue, raised for the first time by appellant's substituted counsel after argument of this appeal and on which the parties have submitted legal memoranda, that federal subject matter jurisdiction over the action is lacking and that the action must therefore be dismissed.

It is further noted that this appeal from the judgments of the district court, entered by Judge Conner and dated May 18, 1978, granting summary judgment to interven-

ing defendants appears to be moot. After this appeal was argued, Judge Sweet issued an opinion dated February 13, 1979, and entered a judgment dated May 31, 1979 in the continuing proceedings in this case in the district court. The holding underlying that judgment is that the defense of fraud is unavailable to appellant Corporacion Venezolana De Fomento, the guarantor. The instant appeal, concerning whether the intervening defendants are holders in due course of certain instruments, is moot if that judgment remains unreversed, although we of course express no view on the merits of that judgment.

WILFRED FEINBERG
WILLIAM H. MULLIGAN
MURRAY I. GURFEIN

Circuit Judges

Opinion of the District Court
dated February 13, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP., SECURITY PACIFIC INTERNATIONAL BANK, VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,
Defendants,

—and—

CANADIAN IMPERIAL BANK OF COMMERCE, THE ROYAL BANK OF CANADA INTERNATIONAL LIMITED, BANQUE CANADIENNE NATIONALE, BANQUE PROVINCIALE, LA-SALLE NATIONAL BANK, and AMERICAN SECURITY AND TRUST COMPANY,
Intervening Defendants,

—and—

VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,
Additional Defendant on the Counterclaim by Intervening Defendants,

—and—

MERBAN INTERNATIONAL, INCORPORATED,
Additional Defendant on the Second Crossclaim by Intervening Defendants.

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SWEET, D.J.

In this diversity suit, Corporacion Venezolana de Fomento ("CVF"), a Venezuelan governmental corporation, seeks a declaratory judgment that its guarantees of two multi-million dollar loans are void and unenforceable. It contends that (1) the requisite governmental approvals had never been obtained, and (2) that it had been induced to execute the guarantees by fraud. Beyond that, it seeks indemnification from the defendants for damages resulting from earlier summary judgment granted on behalf of certain intervenors. Certain of the underlying facts are set forth in the opinion of the Honorable William C. Conner, *C.V.F. v. Vintero Sales Corp.*, 452 F.Supp. 1108 (S.D.N.Y. 1978), which narrowed and defined the issues for trial.

Plaintiff, CVF, is a corporation wholly owned by the Venezuelan government, which gives financial backing, in the form of its guarantee, to projects designed to stimulate Venezuelan economic development. Defendant, the Merban Corporation ("Merban") (the lender), is a Swiss corporation with its principal place of business in New York, which engages in the business of purchasing

debt instruments issued or guaranteed by financial institutions or governmental entities. Defendant Vincent A. de Lyra ("de Lyra"), is at the same time president of defendant Vintero Sales Corporation ("Vintero") (the seller of two ships), a New York corporation, and a shareholder in Venezolana de Cruceros del Caribe, C.A. ("Cariven") (the borrower and purchaser of the two ships), a Venezuelan corporation which applied to CVF for the guarantee and to Merban for the loans which are the subject of this litigation. The remaining defendants, Robert J. Redmond ("Redmond") and James E. Himoff ("Himoff") are vice-presidents of Merban.

At issue here are the validity of guarantees made by CVF covering two loan agreements between Merban and Cariven. Each loan agreement, one dated April 30, 1975, and the other October 15, 1975, provided that Cariven would issue a series of notes to Merban and, in return, Merban would open for Cariven's account an irrevocable letter of credit in favor of Vintero. CVF, although a signatory of the notes in its capacity as guarantor, seeks to nullify its obligations thereunder, claiming that the guarantees had been induced by fraud and were void for failure of conditions precedent.

The loans themselves were to be used to purchase and outfit two ships for use in the Venezuelan passenger cruise trade. CVF sought as guarantor to encourage and facilitate such purchases by borrowers, in this instance Cariven. Both parties entered into a contract dated March 11, 1974, which recited the conditions to be met by Cariven to obtain the loans. CVF points to this contract as setting forth the necessary conditions to the validity of its guarantee endorsement on the notes, and claimed that non-fulfillment of these conditions, and fraud in the inducement to the guarantees, warranted

rescission of its guarantees and the underlying loan agreements.

Defendants herein, as well as certain intervening banks who had purchased participating interests in the guaranteed notes, moved for summary judgment to enforce plaintiff's liability. Judge Conner granted judgment in favor of the intervening banks, finding them to be holders in due course, not subject to defenses asserted against other defendants. 452 F.Supp. at 1120. As to these remaining defendants, Judge Conner defined two issues for trial: the first, whether there was compliance with the contractual condition precedent of approval from the Venezuelan Controller General, and the second, whether CVF had been fraudulently induced to enter into the guarantees. As to the first, CVF had originally asserted that there were six conditions precedent to the effectiveness of the guarantees.[1] Judge Conner found that, of these six, not one appeared on the face of the promissory note, and only one was actually listed as a condition in the loan agreements themselves, namely prior approval of the Controller General ("CG"). All of the remaining "conditions" were held to

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1 According to CVF, these were:

> . . . (1) that the two ships to be purchased by Cariven have a capacity of 800 passengers each; (2) that a "ship mortgage" ("prenda naval") on each ship in favor of plaintiff be acquired with the funds obtained from the guarantees; (3) that the shareholders of Cariven increase the company's capital . . . to the amount of the guarantee; (4) that [Cariven] have available in cash not less than Bs.2,000,000 (Venezuelan currency) for working capital; (5) that approvals for the transactions be obtained from the Ministry of Communications; and (6) that approvals for the transactions be obtained from the Controller General [of Venezuela].

452 F.Supp. at 1113.

be requirements imposed by CVF as its own prerequisites to the issuance of the guarantees. The court held that Merban was not an insurer that CVF's own internal requirements were complied with, or that the judgment of CVF's agents on that score was exercised wisely or correctly. 452 F.Supp. 1114-15. Therefore the narrow issue left for trial was whether there was compliance with the condition as to approval of the CG. 452 F.Supp. at 1115.

Judge Conner also left for trial "(t)he question of the participation of Merban or its officers or agents in a scheme to defraud plaintiff." 452 F.Supp. at 1115. Similarly, the issue of whether Vintero, de Lyra, Redmond and Himoff were participants in the fraud was left open.[2]

1. Approval of the Controller General

CVF asserts that the approval obtained for the first loan agreement was ineffective under Venezuelan law, due to a failure of compliance with an express condition of the loan agreements with respect to approval of the CG. Further, CVF asserts that, as to the second loan agreement, no approval of the CG was ever obtained.

The issue as to the first loan agreement is not whether the approval of the CG had in fact been received.[3] Rather, it is whether that approval was legally effective. CVF contends that the Venezuelan law governs the issue of compliance with the condition. However, by the express terms of the contract, "(t)he present contract and

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2 The record at trial was devoid of allegations against Himoff and a motion to dismiss him from the suit was granted.

3 Plaintiff concedes that it sent a Telex message to Merban representing that the approval of the Controller General had been obtained. 452 F.Supp. at 1115.

the notes mentioned therein shall be subject to and interpreted in accordance with the law of the State of New York, USA. . . ." The clause goes on to provide for the execution in Venezuela of extra-territorial judgments.[4]

The relevant clause in the loan agreement provided that prior to execution: "That the Office of the Controller General of the Republic of Venezuela has granted the approval referred to in Article 5 of the Law for the Protection and Development of the National Merchant Marine." Properly construed, the provision required no more than an expression of approval from the CG. No contractual duty was placed upon Merban to determine whether the Office of Controller General had complied with its own internal requirements in issuing the approval, nor has CVF pointed to any duty arising under New York law. In effect, the contract requires the approval of the CG, and mere presentation by CVF of that approval satisfied the condition.[5]

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4 Although the first loan agreement is expressly made subject to New York law, the very next sentence of the agreement states: "It is understood and agreed however that in order to enforce in Venezuela any decision rendered by the Courts of the United States of America, the legal prerequisites stipulated for this in the Laws of the Republic of Venezuela must be complied with." By its terms, the clause seems to suggest that a Venezuelan court could refuse to enforce a judgment of a New York court where the conditions required under Venezuelan law are not complied with. However, this clause does not represent a governing law provision; at most, it purports to preserve on behalf of the Venezuelan courts the option to refuse to enforce a New York judgment. Further, contractual consistency requires that the clauses be construed, to the extent possible, as consistent with one another. Accordingly, this clause must be interpreted in accord with the prior clause submitting the entire loan agreement to the governing law of the State of New York.

5 An analogous use of a "prior approval" condition arises in contracts for construction,which often require a certificate of approval

Furthermore, CVF is barred by estoppel from asserting non-fulfillment of the condition. Merban carefully reviewed its compliance with the three conditions of the first loan agreement, and determined that it had not yet been advised regarding the approval of the CG.[6] To protect itself, Merban, through Redmond, sent a Telex to CVF stating: "We will accept from you a return Telex advising us that the approval has been received from the Contraloria [CG]. . . ." Redmond also informed CVF that an affirmative response will constitute "your full approval of this contract," and that "(i)f this Telex is received today, we will sign the contract. . . ." CVF responded by Telex on the same date that "we herewith confirm to you that this corporation has today received from the office of the Comptroller General of the Republic the authorization referred to in [clause 7.2 of the loan agreement]."[7] CVF made the same representation to Cariven by letter on that same date. In effect, Merban had informed CVF that it would rely upon CVF's representation regarding the approval of the CG and on that basis estoppel is appropriate.[8]

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from an architect or engineer. In such circumstances, the presentation of that document satisfies the condition. *See e.g.* 3A Corbin on Contracts, § 652 at 123 (1960).

6 Merban informed CVF that "we understand that [approval of the Controller General] has been obtained but has not been officially presented to our [Merban's] counsel in Caracas."

7 In the document referred to in Exh. M-AN, the Office of the Controller notified CVF that "this Office of the Comptroller gives its approval to the collateral submitted. . . .".

8 That CVF induced Merban to enter into the loan agreement with Cariven makes estoppel appropriate as well. *See generally Werking v. Amity Estates,* 155 N.Y.S.2d at 642. Thus plaintiff is estopped from denying that proper approval of the CG was obtained.

Beyond this, CVF expressly waived[9] any non-fulfillment of the condition by its guarantee endorsement on the notes: "[CVF] . . . hereby jointly and severally guarantees, with waiver of any defense, offset of counterclaim, the payment of this Promissory Note on its due date." Such waiver was a knowing one in that CVF had communicated with the CG's office some five weeks prior to the April 30th loan closing, advising it of the "prerequisites which [CVF] had demanded from [Cariven]" and its legal department transmitted to the CG the various supporting documents submitted by Cariven for review by the CG. The CG had before it both the documents and the instructions necessary to complete its responsibilities. CVF was aware of such circumstance and of the review necessary for the required approval. The waiver must therefore be construed as including any claim of improper approval. Additionally, considering that CVF had appointees on the Board of Directors of Cariven to oversee compliance with the various conditions, one of whom directly communicated the approval of the CG to Merban, CVF's communication to Merban constituted a knowing waiver of any claim regarding non-fulfillment of the condition.

As to the second loan agreement, CVF asserts that the requisite approval was never obtained. However, the documents establish that the CG's approval of the first loan agreement extended as well to the second agreement. In its approval dated April 30, 1975, the CG

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9 "A waiver is 'the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.' Whitney on Contracts, 4th Ed., 1946, p. 273." *Werking v. Amity Estates*, 2 N.Y.2d 43, 155 N.Y.S.2d 633, 642 (1956), *appeal dismissed*, 353 U.S. 933 (1957). Judge Conner reserved questions of waiver and estoppel for this trial. 452 F.Supp. at 1115.

advised CVF that it had reviewed "the sufficiency or suitability of the collateral offered by [Cariven] in favor of [CVF], which is to *guarantee . . . the purchase of two ships referred to in your correspondence.*" [Emphasis added]. CVF then notified Cariven that the CG "has advised us that he has approved the security submitted by you, which he considers suitable and sufficient in order that this Corporation guarantee, up to the amount of Bolivares 50,000,000, *the purchase of the two ships* which your company is to contract." [Emphasis added].[11] By its express terms the approval of the CG covered both loan agreements, fulfilling that condition in each.[12]

CVF, however, points to the absence of a governing law provision in the second loan agreement[13] and asserts

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10 The parties at trial agreed that a separate approval had never been issued to cover the second loan agreement. The issue here is whether the one approval satisfied the relevant condition in both agreements.

11 The Order of Guarantee of CVF granted in favor of Cariven expressly covered the "[p]urchase of two passenger vessels," up to a maximum amount of Bolivares 50,000,000.

12 CVF, through its appointee on the Board of Cariven, Jose Angel Lozado Provenzali, signed the October 15, 1975 loan agreement along with its attendant promissory notes in apparent agreement that this condition had been fulfilled. For this, as well as the reasons stated regarding waiver in the discussion relating to the first loan agreement, CVF is also found to have waived any claim regarding non-fulfillment of the condition.

13 CVF makes an alternative argument, namely that the "Act of Commerce" clause in the second loan agreement is itself a governing law provision. That clause provides: "(T)hat the present contract, as well as the issuance of the notes stipulated in it, constitutes [sic] acts of commerce for both parties, and are subject therefore to the law and jurisdiction of the Mercantile Courts." However, as defendants correctly noted, that same provision is found in the first loan agreement coexisting side-by-side with a governing law provision

that Venezuelan law should control its construction.[14] Thereunder, according to CVF, the failure to meet the conditions of the 1974 contract between Cariven and CVF, which conditions are alleged to be required by Venezuelan law and not subject to waiver, would nullify the October 15, 1975 loan agreement and its attendant guarantees.

Absent a specific governing law provision, this court must look to the law of its forum, New York, and the conflicts of laws provisions therein, to determine the applicable law. *K. Laxton Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Under New York conflicts law, the court must apply the law of the jurisdiction having the greatest interest in the litigation.[15] The transaction at issue took the following form: CVF, a Venezuelan corporation, agreed to endorse promissory notes which Cariven, a Venezuelan corporation, would accept in favor of a financing entity. Inquiry was made to Merban, defined in the loan agreement as a New York

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requiring the application of New York law. Seen in this light, the clause does not say what CVF seeks to have it say, but merely specifies the Venezuelan forum, and the applicable Venezuelan law therein, for suits brought within that country.

14 All parties to the earlier summary judgment motion had "asssumed the applicability of New York law" as to both loan agreements. 452 F.Supp. at 1112, n.3. Here, CVF asserts the applicability of Venezuelan law, seeking to alter the law of the case and resurrect consideration of the excluded "conditions."

15 "[W]here the parties have not expressed such choice [of the applicable contract law] in their agreement, . . . [the court will apply] the law of the jurisdiction having the greatest interest in the litigation (*Intercontinental Planning v. Daystrom, Inc.* [24 N.Y.2d 372 (1969)] [other cites omitted])." *Crisafulli v. Childs*, 33 A.D.2d 293, 307 N.Y.S.2d 701, 704 (1970).

corporation,[16] to undertake the financing. On October 15, 1975, Cariven entered into the loan agreement with Merban, with CVF as signatory, under which Merban would open for the account of Cariven an irrevocable letter of credit in favor of Vintero, a New York corporation. Cariven executed the promissory notes and delivered them to New York payable to the order of Merban at Chemical Bank in New York. Merban in turn procured the issuance of Security International Bank, a financial institution doing business in New York, of the letter of credit, and delivered the notes in blank to Security Pacific as collateral and to hold by it as agent for others who would purchase participating interests therein. The participating interests were sold to various financial institutions by Merban International, a subsidiary of Merban duly incorporated in New York. In accordance with the terms of the agreement, the loan was made in New York payable to the order of Vintero, and paid in dollars. Repayment by the borrower would be made in dollars to Chemical Bank in New York City.

In substance, the transaction bore the earmarks of a New York transaction: the financing was solicited in New York, from a corporation doing business in New York, through a bank doing business in New York, with security held in New York, and participating interests therein sold in New York. Accordingly, this court holds that New York law governs the second loan agreement.[18]

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16 The Merban Corporation is referred to as a New York corporation in the loan agreement. However, it is a Swiss corporation qualified to do business in New York.

17 *See e.g.* letter dated November 18, 1974 from Vintero to Merban.

18 If Venezuelan law was applicable, this court would have to seek further assistance from the parties in its determination. *See* Rule 44.1,

As set forth above, the express language of the approval indicates it was applicable to each of the two separate agreements, thereby satisfying the relevant conditions therein. Nothing in New York law requires a different conclusion. Further, as with the first loan agreement, under New York law CVF is barred by estoppel and waiver from asserting any nonfulfillment of this condition.

Fed. R. Civ. P. At trial, the sole witness on the subject of Venezuelan law was Dr. Luis Casado Hidalgo, an attorney from the Venezuelan Controller General's office brought in to testify as to the authenticity of documents in the CG's file. This court would not have been able to make a Rule 44.1 determination on foreign law on that testimony alone.

Beyond this, the thrust of the witness' testimony was that, under Venezuelan law, a lender could not rely upon the guarantor's express representation that the necessary conditions to the guarantee had been fulfilled, but would itself have to review compliance by the borrower. This interpretation of Venezuelan law is restrictive and local in its character, benefiting Venezuelan governmental entities to the detriment of foreign borrowers and would probably not be respected in this jurisdiction. Further it contravenes the express language of the guarantee endorsement by which CVF waived any defense it might have against the holder of the note. These notes, together with the CVF endorsement, met the approval of the CVF Legal Department. Finally, the December 19, 1975 communication between the Ministry of Communications and CVF advised CVF that "your corporation may not grant loans or guarantees to finance the acquisition of ships or navigating equipment without the respective asset subject of acquisition being previously examined by this office." It further reminded CVF that "prior approval of each ship or equipment financed by any official entity is to reduce the risks with respect to the wasting of state resources. . . .". One would think such warning unnecessary where, if plaintiff's view of Venezuelan law is accepted as accurate, the simple absence of an appropriate approval would render the contract void *ab initio* and unenforceable against CVF. Indeed, this communication resembles nothing less than an admission that CVF had not been fulfilling its responsibilities in ensuring compliance by borrowers who sought its guarantees, here Cariven.

2. Fraud

CVF sought to set forth and prove an elaborate fraud conceived by de Lyra and carried out through his liaison, Federico Gascue Rios ("Gascue"),[19] and with the assistance of Merban. Crucial to CVF's theory is the threefold role of de Lyra as owner of Vintero, 49% shareholder in Cariven, and agent of Merban in Venezuela. 452 F.Supp at 1115. According to this theory, de Lyra conceived the idea of acquiring ships for passenger trade in Venezuela. To effectuate this end, de Lyra and Gascue created Cariven, through which application would be made to CVF for a guarantee. De Lyra's sole purpose in this was to provide the illusion of an arms-length transaction between Vintero and Cariven. Various misrepresentations would then be made to CVF to secure its guarantees of the project. The final step was the involvement of the lender, Merban, through its vice-president, Redmond, who allegedly was either aware of Cariven's "fraudulent substructure" or can have that knowledge imputed to him.

In his testimony at trial, de Lyra sought to disassociate himself from the operations of the borrower, Cariven, and from any improper association with Redmond or Merban. De Lyra himself never appeared as a shareholder of record in Cariven, was never an officer, and testified that he did not disclose his ownership therein to either Merban, Redmond or CVF. Although stating that he originated the idea of entering the cruise trade in Venezuela, and admitting that he was 49% owner of the corporation established to effect that end, Cariven, de

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19 Gascue was the business partner of de Lyra in Cariven. He is not a party to the instant suit.

Lyra asserted that Gascue alone was responsible for its operation. De Lyra did, however, consider himself a joint venturer or perhaps an undisclosed principal in Cariven along with Gascue, and hoped to share in its profits. Futher, he admitted that he had certain obligations to CVF, and that these were outlined in the contract between CVF and Cariven dated March 11, 1974. Among these were: an increase in Cariven capital to the amount specified therein; minimum working capital; joint and several liability of the shareholders.

In that same agreement, CVF sought to protect its own interests and assure compliance with the terms of its contract with Cariven, by imposing extensive controls over the affairs of Cariven. Among other things, CVF was empowered to designate a principal member and an alternate on the Board of Directors of Cariven, as well as grant them veto power in enumerated instances over the acts of Cariven. In August 1974, CVF appointed Alfredo Coroncil Hartman ("Hartman") and Jose Angel Lozada Provenzali ("Provenzali") (as alternate) to the Board of Cariven. Additionally, CVF sought and obtained pledges of Cariven shares for itself,[20] as well as a grant of joint and several liability from Cariven's shareholders in its own favor.

To meet their obligations under the March 11, 1974 contract, de Lyra and Gascue entered into an agreement,

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20 The minutes of the stockholders' meeting of Cariven held on April 1, 1975 provide as follows:

> [T]he Office of the Comptroller of the Republic requires from [Cariven], through [CVF], that the stockholders of [Cariven] transfer their shares as security to [CVF] so that said Corporation may exercise, when it deems proper and for the entire duration of the guarantee, the right to exercise at stockholder meetings . . . the right to vote on matters relating to said guarantee for the entire term of the guarantee.

dated January 15, 1975, to increase the capitalization of Cariven as well as "to fulfill all the requirements of the contract which [Cariven] has made." However, de Lyra testified that no such capital contributions were made and that he had no responsibility to assume compliance with this requirement. Yet, in a letter dated March 20, 1975, Cariven, through its Secretary of the Board of Directors, Luis Dropeza ("Dropeza"), gave notice to CVF "of the increase of the capital of [Cariven]," attaching thereto the minutes of the "special shareholders meeting" of Cariven held March 18, 1975.[21] That document attested to the authorization of the Board of Directors "to proceed to offer to the present and new shareholders proportional amounts of shares." In attendance at the special meeting were both CVF appointees, Hartman and Provenzali. A subsequent document, setting forth the minutes of the stockholders' meeting held the following date, March 19, 1975,[22] purports to attest to the mechanics of the increase in capital. It represented that Isabel de Fabricius ("Fabricius") and Carmen Amalia Susa ("Susa") among others, subscribed to substantial blocks of shares in Cariven, totaling approximately 98% of its shares.[23] Again in attendance were Hartman and Provenzali.

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21 De Lyra and Vintero denied knowledge of the minutes of this meeting.

22 De Lyra denied knowledge of the minutes of this shareholder meeting which were submitted to CVF.

23 Both shareholders, "proceeding in this Act in their capacity as shareholders of the Mercantile Company 'Cariven'," granted Luis Jose Oropeza ("Oropeza"), the Secretary of the Board of Directors of Cariven, powers of attorney with respect to Cariven's transactions with CVF.

However, the subscription was not as it had been represented. The first of the "subscribers," Fabricius,[24] was no more than the nominee for de Lyra, holding the shares in her own name but on his behalf.[25] Although there is no direct testimony on whether Susa was a nominee for Gascue's interest, no other inference seems possible. Despite this, the names of both Fabricius and Susa appear on a document which deferred the payment owed to Vintero by Cariven in an amount equal to one third the purchase price of the first ship (the Santa Rosa), which is the amount of capitalization promised in the contract between CVF and Cariven.[26] The effect of this transaction by the nominees in Cariven, who had made no actual capital contribution thereto, was to defer the corporate obligation of Cariven to Vintero. To this extent they were relieved of any obligation to pay a capital contribution into Cariven.[27] That letter was

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24 Isabel de Fabricius is the sister of Gascue.

25 De Lyra explained that Mrs. Fabricius was in Venezuela permanently while he came there only infrequently, and that she had his confidence. There was no written agreement between them as to the control of her shares. In her testimony, Mrs. Fabricius explained that de Lyra told her that, without her as nominee, "he would lose the business" because he was a foreigner. The record does not conclusively establish that foreign nationals are prohibited from owning shares in a Venezuelan transportation company.

26 The contract provides "that 'The Obligor' shall prove having paid into the Treasury an amount sufficient to cover the items of working capital [et al] . . ., as well as one-third (1/3) of the final price of the ships . . ."

27 The documentation of the arrangement between the two nominees of Cariven and Vintero, deferring payment to Vintero, provides, *inter alia*, as follows: "We have agreed that this amount of Bolivares, 12,500,000.00, corresponds to the payment of 25% of the value of the shares subscribed as capital contributions by the said bodies in [Cariven]. . . .".

eventually filed in the Ministry Registry, presumably by Gascue, on November 4, 1975, after the second loan agreement.

In the midst of this, a letter of credit, purportedly drawn upon the Bank of America by AID, Ltd., turned up. By its terms, it was to constitute compliance with clause 14(c) of the 1974 contract between CVF and Cariven, regarding the working capital requirement, and a cover letter to this effect was purportedly submitted therewith by Dropeza to CVF on March 20, 1975. However, at trial, de Lyra vigorously denied any knowledge of this purported letter of credit, calling it a fraud. Further, certain obvious errors in the letter have been pointed out and its authenticity is in serious doubt.

The trial testimony established that in the interim, a hitch developed in the shareholder structure of Cariven since both nominees wanted out. The husband of one of them, Hans Fabricius, became concerned over his wife's personal liability and placed a call to de Lyra, who promised to clear things up when he next visited Caracas. Meanwhile, Mrs. Fabricius herself called Dr. Octavio Calcano-Spinetti ("Calcano"), Merban's attorney,[28] but only managed to relay a message through Calcano's wife that things were not going well. Calcano returned the call and Hans informed him of his wife's situation. Although Calcano wanted no part in the conversation, stating that he was Merban's lawyer and knew nothing about Cariven, Hans told him that "my wife was involved in some phony operation of 24½ million Bolivares, where did she ever get that from; that she is sitting on some stock . . ." and wanted an explanation. The conversa-

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28 Calcano is a Venezuelan lawyer who was retained by Merban in connection with the loan agreements.

tion ended with Calcano asking Fabricius to put an end to the calls between their respective wives.

Thereafter, Hans spoke directly with Redmond,[29] informing him that de Lyra "had done something to my wife about 24½ million Bolivares which I didn't think was proper." Hans was concerned about his wife's position as "nominee of a non-registered foreign investment," and at trial characterized the operation as a "fraud." He wanted Redmond "to talk to Mr. de Lyra so that we can get . . . this thing together, settle it and we see what we can do that my wife is safely protected."[30] Almost immediately thereafter, de Lyra contacted Hans informing him that he should not have called Redmond, since "Mr. Redmond is a gentleman who probably doesn't understand certain things. . . .". De Lyra was concerned that the call to Redmond might "blow everything to pieces," and told Hans that he would himself settle the nominee situation.

In a document dated August 1, 1975, de Lyra, in his capacity as President of Vintero, purported to relieve both nominees of their obligations to Vintero by a transfer of the liability to a separate corporation, Promociones Turisticas.[31] That document was never filed in the Mercantile Registry or given to CVF; however,

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29 Hans called Redmond because he knew that Redmond was a friend of de Lyra and had been involved in some business projects with de Lyra.

30 Redmond testified that, "I told Fabricius that I didn't know what he was referring to or talking about, that I couldn't help him, but I would do the best I could to get hold of Vincent de Lyra to call him, which he [Fabricius] seemed to want."

31 Promociones Turisticas had been organized to serve as marketing arm for Cariven in the operation of the two ships. Its purported founders, Dr. Zambrano and Mr. Procovic, were themselves nominees for the interests of de Lyra and Gascue.

other documents formalizing the transfer of liability from the nominees to Promociones Turisticas were signed August 22, 1975 and filed in the Registry February 12, 1976.

Besides the alleged fraudulent subscription by Fabricius and Susa, and its non-disclosure, CVF points to other alleged material misrepresentations by Cariven, asserting that these also induced it to enter into the loan guarantees. Specifically, these include alleged representations regarding ship capacity, and the security interests granted CVF in the two ships.

Regarding ship capacity, de Lyra was aware of the capacity requirement set by CVF, namely that the ship capacity equal 800 passengers. In a pro forma invoice addressed to Cariven on or about December 20, 1974, he noted that the capacity of the S.S. Santa Rosa would have to be increased to the required 800 passengers. De Lyra denied sending this invoice to CVF. Additionally, he denied knowing that the agreement between Vintero and Cariven for the purchase and outfitting of the vessels would be received by CVF. De Lyra's contentions were not challenged by the sole witness from CVF, Dr. Muhica, nor is there other evidence indicating CVF received these invoices. Even more importantly, there is no evidence that the passenger capacity of the Santa Rosa could not have been increased to meet the 800 figure. As to the second ship, the S.S. Bahama Star, Cariven notified CVF in a letter dated October 21, 1975, that the passenger capacity was 780, and CVF found that acceptable.

As to ship age,[32] Cariven had informed CVF in a letter dated May 10, 1974, that the Santa Rosa had been built

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32 Although the contract between CVF and Cariven only specifies that the ships be of "[r]ecent construction," CVF argues the applicability

in 1958 and had been in active service for 11 years. CVF has not pointed out any representation by Cariven regarding the age of the Bahama Star.

Finally, with respect to the security interest in the two ships, CVF was granted a first chattel ship mortgage, duly filed, in the Santa Rosa by document dated May 20, 1975. On opinion of counsel, the chattel mortgage "will give the mortgagee a perfected security interest under the Uniform Commercial Code against the 'Santa Rosa'. . . .". The security agreement and financing were signed by de Lyra on behalf of Vintero and by the Consul General of Venezuela on behalf of CVF. Similarly, with respect to the second ship, the S.S. Bahama Star, CVF was granted a chattel mortgage duly filed, which on a smilar opinion of counsel "will give the Mortgagee a perfected security interest under the Uniform Commercial Code against the 'Bahama Star'. . . .". The Consul General of Venezuela again signed the financing statement on behalf of plaintiff, while de Lyra signed on behalf of Vintero.

As to each of these alleged misrepresentations, CVF's proof of fraud[33] against defendants de Lyra and Vintero is deficient in one key respect,[34] namely in the element of

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of a government regulation specifying a maximum ship age of 15 years. However, compliance with that regulation was an internal matter for CVF and not an issue in this case. The issue here is, again, whether CVF had been fraudulently deceived by misrepresentations by the defendants.

33 The elements of fraud are "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury." *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 302 N.Y.S.2d 799, 803 (1969).

34 By pointing to the deficiency in proof of reliance, this court is not implicitly finding that the remaining elements of fraud have all been

reliance. Where there is no reliance upon a representation, there can be no relief by merely establishing its falsity. *See generally* 24 N.Y. Jur., Fraud and Deceit: § 157 at 224. Further, the representation must be a material inducement to the action. *Id.* at 232. *See also State Street Trust Co. v. Ernst,* 278 N.Y. 104, 122, *reh. den.,* 278 N.Y. 704 (1938). First, CVF has failed to establish that it ever received certain of the documents which it alleges were relied upon. Further, this court cannot find the requisite reliance on any alleged misrepresentations made by Cariven since CVF had itself undertaken extensive supervision over the affairs of Cariven and at trial failed to provide witnesses to establish reliance.

As to the first, a number of documents allegedly relied upon by CVF were never directly communicated to CVF nor filed in the Mercantile Registry[35] prior to the

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proven. For example, as regards proof of misrepresentation, this court cannot find that the documents regarding ship capacity are deceptive since each expressly noted that ship capacity would have to be increased to meet the specified passenger capacity of 800. Further, there is no proof from plaintiff, who bore the burden on the subject, that the Santa Rosa could *not* be increased to 800, especially since it was a mixed passenger-cargo vessel due to undergo vast modification. As for the Bahama Star, ship capacity was 780, a fact known to CVF. Proof of deception is similarly absent with respect to ship age, since Cariven had in a letter dated May 10, 1974, informed CVF of the age of the Santa Rosa. Finally, as regards the security interest in the two ships, there has been no showing of deception or injury. Indeed, the Consul General of the Republic of Venezuela signed each financing statement on CVF's behalf. In sum, plaintiff has not shown that non-compliance (to the extent it existed) arose, not from the plaintiff's knowing waiver, but from the defendant's deception.

35 The Mercantile Registry is a Venezuelan governmental unit, which, among other things, is the depository for documents of maritime companies. Plaintiff's position is, presumably, that such filings constitute constructive notice of their contents.

completion of the various loan agreements. Specifically, these include: the documentation of the arrangement between the two nominees of Cariven and Vintero deferring payment to Vintero; the substitution of Promociones Turisticas for the nominees' interests in Cariven; the agreement between Promociones Turisticas and Mrs. Fabricius; the 1974 contract between Vintero and Cariven; and the December 20, 1974 *pro forma* invoice. Absent proof of actual or constructive receipt of these documents by CVF they cannot support a claim of reliance, even if it is assumed that they were inherently and consciously misleading.

More importantly, however, CVF had reserved for itself extensive control over the functioning of Cariven.

> One is not entitled to relief on the grounds of false representations where, instead of relying upon them, he resorts to other means of knowledge, or information, as where he relies on his own investigations . . . or on the advice of other third persons or on information obtained from them. 24 N.Y. Jur., *supra,* § 163 at 230.

In addition to appointing directors to the Board of Cariven, CVF required the affirmative vote of that director to undertake certain transactions; it reserved the right to demand additional financial assurance from Cariven; it required the pledge of Cariven shares as collateral. In short, it used its leverage as guarantor to oversee the operation of Cariven and protect its own interests. CVF has not satisfied this court that, despite these independent sources of information about Cariven, CVF did rely upon the alleged misrepresentations made to it. Further, CVF has not shown which alleged

misrepresentations, if any, actually induced it to enter into the Cariven guarantees.

Specifically, CVF did not present the testimony of either Hartman or Provenzoli, both CVF's appointees on the Board of Cariven.[36] Nor did it present the testimony of Marcel Curiel Baiz, then president of CVF, nor of any of CVF's other decision makers to show which documents or representations they relied upon. The only witness employed by the plaintiff, Dr. Rafael Mujica, had no personal knowledge of the matters before this court. In essence, CVF merely points to the presence of certain documents in the files of the Mercantile Registry, documents which were either filed with the Registry after the date of the second loan agreement or were unconnected to the defendants,[37] to make its case on reliance. In the light of CVF's failure to produce available witnesses, this court does not find that it met its burden. *See Christman v. Maristella Compania Naviera,* 349 F.Supp. 845, 852 (S.D.N.Y.), *aff'd.,* 468 F.2d 620 (2d Cir. 1972).

Beyond this, CVF would not even be entitled to claim reliance upon certain documents. "The principle is . . .

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36 For example, the testimony of the appointed directors might have explained the function, if any, of the so-called A.I.D. Letter of Credit in the capital structure of Cariven. That the document was ultimately "found" in the files of CVF proves nothing to this court. Additionally, they might have identified the "19 exhibits forming the file of said financial operation," which was the basis for the CG's approval of the collateral of Cariven. *See* Exh. 57. Although Exh. M-P lists the 19 "prerequisites which [CVF] demanded from [Cariven]," this court has no direct testimony of what documents the CG reviewed or relied upon in extending its approval.

37 Defendants de Lyra and Vintero consistently denied that they had participated in any attempt to conceal or misrepresent material facts to the plaintiff.

well established that in order to secure relief on the ground of fraud, the complainant must have had, under the circumstances of the case, a right to rely upon the misrepresentation which is sought to be made the basis of the charge of fraud." [cites omitted]. 24 N.Y. Jur., *supra,* § 168 at 235. Further, the party deceived must not only be justified in his belief that the representation is true, but he must also be justified in taking action on the representation. *Robitzek v. Reliance Intercontinental Corp.,* 7 A.D.2d 407, 183 N.Y.S.2d 870, 872 (1st Div. 1959), *aff'd.,* 7 N.Y.2d 1041, 200 N.Y.S.2d 424 (1960). CVF has not satisfied this court of such a right to rely. For example, the minutes of the Cariven Board meeting held on March 18, 1975 purported to attest to the increase of capital of Cariven. Although that document was sent to CVF, the subsequent document which regarded the actual "subscription" was not so provided. In effect CVF had a representation regarding an increase in capital, but no document regarding actual subscription.[38] The subsequent document was necessary before it could properly rely on the March 18 minutes.

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38 This was flagged in a report of CVF's Legal Department dated May 18, 1976, which noted that, "although [the document] stated that it is 'necessary to increase [capital] to Bolivares 50,000,000, *this is no more than an intention.* . . .'" [Emphasis added.] With regard to the minutes of the March 19, 1975 meeting of Cariven directors, the report states that: "[W]ithout considering other defects of the defective "Stockholders Meeting" it appears evident from the text itself . . . that no increase in capital was resolved or formalized." The report goes on to mention the meeting of the Board of Cariven on April 1, 1975, at which Dr. Hartman, its own appointee, was in attendance. Regarding the claimed increase in capital, the report states:

> The resolution adopted by this "stockholders meeting is surprising since, without having resolved, or materialized [sic] in any increase in capital previously, in accordance with what we just analyzed,

CVF's case on reliance is circumstantial at best. It put its faith in a company whose files were in a state of disarray; whose directors were housewives; whose promoters had no prior experience in any maritime operation—let alone a cruise trade; whose supplier and outfitter had never before handled a merchant vessel. In short, CVF showed itself willing to provide backing for a company with no expertise or past record to indicate any anticipation of success at the task undertaken, without showing reliance on the alleged misrepresentations.

3. Extent of Knowledge and Participation of Merban

CVF sought to impute de Lyra's allegedly fraudulent dealing with CVF to Merban as a defense to the guarantees.[39] Although this issue has been mooted by a finding of no actionable fraud with respect to de Lyra and Vintero, it will be considered briefly below.

First, CVF asserts that, since de Lyra was an agent of Merban, his dealings could be imputed to Merban as principal. While it is true that Judge Conner found de

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this meeting claims that the capital of [Cariven] is Bolivares 50,000,000."

Considered in the light of CVF's own assessment of the reliability of these representations, its contention before this court that "the Venezuelan government was led to believe that it was dealing with a corporation with a subscribed capitalization of about $2 million [about 50,000,000 Bolives]," is without basis. In fact, CVF did not have any document in its possession from which to believe that the requisite capitalization had been obtained.

39 The controlling principle of law is that "when the prime obligor has fraudulently induced a person to sign as guarantor, such fraud may not be used as a defense against the obligee in an action on the note unless the obligee participated in the fraud. [Citations omitted]." *U.S. v. Basil's Family Supermarket, Inc.*, 259 F.Supp. 139, 141 (S.D.N.Y. 1966).

Lyra to be an agent of Merban, 452 F.Supp. at 1115, the extent of that agency was not defined. He left for trial a determination whether de Lyra conducted his questionable activities with the knowledge of Merban.

Testimony demonstrated that de Lyra was Merban's agent for the limited purpose of proposing financing opportunities for Merban. There is no evidence that de Lyra had a broader scope of responsibility to Merban, or that a part of his limited function was the disclosure to Merban of the financial capability of the borrower. Nor is there proof that any of the alleged misrepresentations to CVF were within the scope of his authority for Merban, or that CVF would have been justified in drawing such an inference.[40] In short, de Lyra's dealings with CVF were independent of his limited agency to Merban[41] and cannot be imputed to Merban as principal.[42]

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40 *See generally Dr. Back & Co. G.M.B.H. v. General Electric Co.*, 210 F.Supp. 86, 90 (S.D.N.Y. 1962), *aff'd.*, 317 F.2d 538 (2d Cir. 1963).

41 It is hornbook law that an agent may be one party's agent for one purpose and another party's agent for another (2 N.Y. Jur., Agency § 205). . . . Even if such be the case, the agent's powers are limited to the particular purpose for which the agency is, or appears to be, created (*id.*, § 143; *Northern Assur. Co. v. B.A.W. Trucking Co.*, 252 App. Div. 323; *Doubleday v. Kress*, 50 N.Y. 410).

Koreska v. United Cargo Corp., 23 A.D.2d 37, 40-41, 258 N.Y.S.2d 432 (1st Dept. 1965).

42 Judge Conner noted that "[t]he available documents do suggest—strongly—that de Lyra conducted his questionable activities without the knowledge and independently of his agency with Merban." 452 F.Supp. at 1115. Proof at trial confirmed Judge Conner's premonition.

Second, Redmond, a vice-president of Merban, and charged with its affairs in Venezuela, was and continued to be a business partner with de Lyra. According to this theory, Redmond was aware of the fraudulent underpinnings of Cariven and his knowledge could be imputed to his principal, Merban.

The proof, however, is otherwise. De Lyra testified that he never told Redmond of his own interest in Cariven; this testimony is uncontroverted. Redmond was aware of a possible nominee problem in Cariven, having been told by Fabricius that "my wife stands the possibility of being accused of being the nominee of a non-registered foreign investment." But Fabricius called Redmond only because he could not reach de Lyra, and asked Redmond to speak with de Lyra to "get this thing together, settle it. . . .". Almost immediately thereafter, de Lyra spoke to Fabricius admonishing him that Redmond "probably doesn't understand certain things. . . .". At most, Redmond knew of a possible difficulty with Venezuela's foreign investment law (assuming for the moment that such a law exists), and referred the problem to de Lyra, as requested, to settle it. However, there is no testimony that Redmond knew that Mrs. Fabricius was a nominee for de Lyra's own shares. Quite obviously from the testimony of both Mr. and Mrs. Fabricius, there was much more heat than light on the subject of the capital contributions and their object as perceived at the time was simply to assure an absence of personal liability, not to reveal any impropriety. Further, Fabricius himself was satisfied that the problem was solved and no further inquiry was made to Redmond. Beyond that, the testimony is that Redmond was diligent in assuring compliance with the conditions found in the loan agreements. Nowhere is

there any proof that de Lyra and Redmond were in complicity[43] or that any complicity can be imputed to Merban.

Finally, plaintiff points to the conversations between Calcano and Hans Fabricius, during which Calcano was informed that Mrs. Fabricius was "sitting on some stock" that she did not own. According to the plaintiff, this amounted to knowledge of the alleged fraud, and was attributable to Calcano's client, Merban.

At most, however, Calcano had been informed of a possible difficulty with Venezuela's foreign investment law. However, any problem that arose as to the nominee status of Isabel de Fabricius was the concern of CVF, and not Merban, as Calcano correctly informed Fabricius at the time. Plaintiff cannot point to any duty owed by Calcano's client Merban to ensure compliance with the 1974 agreement between CVF and Cariven. Calcano's own responsibilities were to ensure that the conditions of the first and second loan agreements were complied with so as to protect Merban's interests,[44] not to assist CVF in determining Cariven's compliance with the 1974 agreement to which Merban was not a party.

In sum, each of CVF's theories of participation or constructive knowledge of alleged fraud by Merban fails

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43 Plaintiff refers to the "bridge loan" from Merban to Vintero financing Vintero's purchase of the Santa Rosa as evidencing complicity between de Lyra and Redmond. However, Vintero was itself the payee of the letter of credit opened by Merban for the account of Cariven. That Merban should extend a bridge loan to Vintero on the strength of this transaction for the purchase of the ship is unremarkable, even though only secured by a promissory note. In no event does it evidence, as plaintiff would have it, an "undisclosed interest [of] Redmond' in the scheme of Gascue and de Lyra."

44 This court has already found that Merban fully complied with the conditions in the two loan agreements.

for want of proof. The notes and CVF's guarantees thereof are valid obligations enforceable according to their terms.

Conclusion

CVF has failed to establish by a preponderance of the evidence that it is entitled to a declaratory judgment voiding its guarantees. Defendant Merban is entitled to recovery with interest on its counterclaim. This opinion constitutes this court's findings of fact and conclusions of law. The parties shall settle the judgment on notice.

IT IS SO ORDERED:

ROBERT W. SWEET

Robert W. Sweet
U.S.D.J.

Dated: New York, New York
February 13, 1979

Memorandum and Order of the District Court dated April 14, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1671 (WCC)

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP., SECURITY PACIFIC INTERNATIONAL BANK, VINCENT A. DE LYRA, ROBERT J. REDMOND and JAMES E. HIMOFF,
Defendants,

—and—

CANADIAN IMPERIAL BANK OF COMMERCE, THE ROYAL BANK OF CANADA INTERNATIONAL LIMITED, BANQUE CANADIENNE NATIONALE, BANQUE PROVINCIAL, LA-SALLE NATIONAL BANK and AMERICAN SECURITY AND TRUST COMPANY,
Intervening Defendants,

—against—

VENEZOLANA DE CRUCEROS DEL CARIBE, CA.,
Additional Defendant on the Counterclaim by Intervening Defendants,

—and—

MERBAN INTERNATIONAL, INCORPORATED,
Additional Defendant on the Second Cross-Claim by Intervening Defendants.

Memorandum and Order

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CONNER, *D. J.*:

Plaintiff in this diversity action seeks a declaratory judgment that its guarantees of two multi-million dollar loans are null and void and rescission of the guarantees and of the underlying loan agreements. The party which financed the loans and several Canadian and American banks which purchased interests in the promissory notes issued in connection therewith assert that the loans are in default and have counterclaimed for the award of principal and interest said to be owing from the guarantor.[1] Presently before the Court are the motions

1 At the time this action was brought, there was not a justiciable controversy since the obligor had not yet defaulted on the promissory notes. The counterclaims which have been asserted by defendant Merban Corporation, however, were justiciable when filed and remain so at the present time. Since they have an independent basis of federal jurisdiction (diversity of citizenship), they would properly be before this Court irrespective of the fate of the main claim. National Research Bureau, Inc. v. Bartholomew, 482 F.2d 386 (3d Cir. 1973); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1414 at 80 (1971). The Canadian and American banks intervened as of right pursuant to Rule 24(a), F.R.Civ.P. Their counterclaims are ancillary to the claims asserted by Merban and therefore do not require an independent basis of federal jurisdiction. See, United States v. Local

of defendants Merban, Redmond and Himoff and those of the intervening defendants for summary judgment dismissing the complaint and holding plaintiff liable on the notes.

The loan agreements in issue in this case—one executed on April 30, 1975 (the "April Agreement") and the other on October 15, 1975 (the "October Agreement")—have a distinctly international flavor. The parties thereto are defendant The Merban Corporation ("Merban") (the lender), a Swiss corporation with its principal place of business in New York; Venezolana de Cruceros del Caribe, C.A. ("Cariven") (the borrower), a Venezuelan corporation with its principal place of business in Caracas, Venezuela; and plaintiff Corporacion Venezolana de Fomento ("CVF") (the guarantor), a Venezuelan corporation wholly owned by the government of Venezuela and organized to help obtain financing for new industry. The purpose of the loans was to finance Cariven's purchases of two vessels, the S. S. Santa Rosa and the S. S. Santa Paula, from a New York corporation with its principal place of business in New York, defendant Vintero Sales Corporation ("Vintero") (the seller).

The April and October loan agreements were drafted nearly identically. Both provided, in substance, (1) that Merban open for the account of Cariven an irrevocable letter of credit in favor of Vintero for $5,525,000; (2) that Cariven deliver to Merban eight interest-bearing promissory notes, in principal amounts totalling $5,813,950; and (3) that CVF guarantee the obligations assumed by Cariven under the Agreement, with a specific

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638, 347 F. Supp. 164, 165 (S.D.N.Y. 1972); 3B Moore's Federal Practice ¶ 24.18[1].

guarantee of the Notes. The first of the April series of notes was to be due November 1, 1976, and the first of the October series, April 15, 1977, with the remaining notes to mature at six-month intervals thereafter, until April 30, 1980, under the April Agreement, and October 15, 1980, under the October Agreement. The Agreements provided that the loans would earn interest at a specified rate to be paid upon the expiration of each period of six months from the dates of execution of the Agreements. In each Agreement, the provision for the CVF guarantee read as follows:

> "The 'Corporacion Venezolana de Fomento' of the Republic of Venezuela, an autonomous official institute, domiciled in Caracas, represented by [its 'Chairman' in the April Agreement, and by its 'Acting President' in the October Agreement] . . . authorized for this instrument by the Board of Directors of the Corporacion at its meetings of March 13, 1973, January 23, 1974 and March 8, 1974 and also by the Council of Ministers at its meeting of March 7, 1974, in accordance with Official Communication from the Ministry of the Treasury No. HCP-200-0215 of March 8, 1974, constitutes itself as guarantor and principal debtor to guarantee the obligations assumed by 'VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.' towards 'THE MERBAN CORPORATION' by virtue of the present contract and specifically agrees to endorse the notes which are to be issued in accordance with the provisions of Article 1.6."

On the date of execution of each Agreement, Cariven delivered to Merban eight promissory notes evidencing

the indebtedness, each in the amount of $726,743.75. The notes recite that they bear "interests computed from the date of issue, payable every six (6) months until maturity of same." Each note is guaranteed on the face thereof by CVF as follows:

> "CORPORACION VENEZOLANA DE FOMENTO of the Republic of Venezuela, herein represented by [its 'President' in the April guarantees and by its 'Acting President' in the October guarantees], duly authorized by its Directory in its meetings held on March 13, 1973 and January 23 and March 8, 1974, and by the Cabinet of the Republic of Venezuela, in its meeting held on March 7, 1974, hereby jointly and severally guarantees, with waiver of any defense, offset, or counterclaim, the payment of this Promissory Note on its due date."

Following Merban's receipt of each series of notes, and pursuant to CVF's request, Merban paid CVF the sum of $87,209.25 as CVF's commission for its guarantee of the Cariven financing.

Thereafter, in accordance with the terms of each Agreement, Merban opened irrevocable letters of credit for the account of Cariven with Security Pacific International Bank ("Security Pacific") in favor of Vintero in the amount of $5,525,000. Vintero subsequently drew $4,143,750 under each letter of credit.

Merban later endorsed each series of Notes in blank and delivered them to Security Pacific as collateral for the credit extended by Security Pacific to Merban. The April Notes were then transferred by Security Pacific to Chemical Bank ("Chemical") to be held by Chemical for

the benefit of Security Pacific, Merban and any other persons to whom Merban's affiliate, Merban International, might thereafter sell participating interests in the Notes; the October Notes were held by Security Pacific (rather than Chemical) for the same purpose.

Following the delivery of the April Notes to Chemical, Merban International sold to four Canadian banks—intervening defendants Canadian Imperial Bank of Commerce, The Royal Bank of Canada International Limited, Banque Canadienne Nationale, and Banque Provinciale ("intervenors")—participations in the Notes in the aggregate principal amount of $5,318,950.[2] Chemical issued to each Canadian bank participant a certificate of participation transferring ownership in the Notes to the extent of the interest purchased. Similarly, subsequent to the delivery of the October Notes to Security Pacific, Merban International sold to intervenors LaSalle National Bank ("LaSalle") and American Security and Trust Company ("American Security") participations in the October Notes in the aggregate principal amount of $2,000,000. Each of these banks also received a certificate of participation (issued by Security Pacific) transferring ownership in the Notes to the extent of the interest purchased.

Merban retains for its own account an interest in the April Notes to the extent of $500,000 in principal amount, and in the October Notes to the extent of $3,813,950 in principal amount.

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2 The amounts of the participating interests for each bank are:

Canadian Imperial Bank of Commerce	$ 2,813,950
The Royal Bank of Canada International Limited	1,000,000
Banque Canadienne Nationale	1,000,000
Banque Provinciale	500,000

On April 15, 1976 and April 30, 1976, respectively, Cariven failed to pay the installments of interest which were then due on the October and April Notes. No payments of principal or interest have been made since October 30, 1975. Each of the Notes provides:

> "Failure to pay any interests hereunder, within thirty (30) days after due, shall cause the whole note to become due and collectible at once."

Defendant Merban and intervening defendants assert that the Notes are now due and collectible from CVF with interest.

As the basis for being relieved of its obligations under the guarantees, plaintiff contends that numerous conditions precedent to their effectiveness were not satisfied and that the guarantees and the loan agreements underlying them were procured by fraud in which Merban, through various of its employees and agents, was a participant. Although the loan "participants" (intervenors) are not alleged to have been a party to any fraudulent or conspiratorial conduct, their own attempt to enforce the guarantees "notwithstanding any right of plaintiff to rescind [them] as against Merban" is resisted on the ground that they did not take the notes in good faith and without notice of defenses against them and are therefore not holders in due course under principles of negotiable instruments.[3]

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3 All parties to this motion have assumed the applicability of New York law. Although Venezuela is a concerned jurisdiction with respect to certain of the issues herein, the parties have not sought to prove Venezuelan law, see Rule 44.1, F.R.Civ.P., or asserted that it is in conflict with the law of New York. The Court itself is not obligated, under Rule 44.1, to take judicial notice of foreign law. Accordingly, no choice-of-law issue is presented, and the Court will apply the law of the forum state, New York.

April and October Loan Agreements and Guarantees

Conditions Precedent

Plaintiff contends that there were six conditions precedent to the effectiveness of its guarantees. These were: (1) that the two ships to be purchased by Cariven have a capacity of 800 passengers each; (2) that a "ship mortgage" ("prenda naval") on each ship in favor of plaintiff be acquired with the funds obtained from the guarantees; (3) that the shareholders of Cariven increase the company's capital of the enterprise to the amount of the guarantee; (4) that the enterprise have available in cash not less than Bs. 2,000,000 (Venezuelan currency) for working capital; (5) that approvals for the transactions be obtained from the Ministry of Communications; and (6) that approvals for the transactions be obtained from the Controller General.

Not one of these alleged conditions appears on the face of any of the promissory notes, and only one of the six (approval of the Controller General) is listed as a condition in the April and October loan Agreements. The remaining conditions are requirements that were imposed by the CVF Board of Directors in its meeting of March 13, 1973[4]—requirements that were re-confirmed by the Venezuelan Cabinet, in its meeting of March 7, 1974,[5] to be conditions to the granting of the guarantees.

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4 The specific action taken by the Board of Directors at the March 13 meeting is set forth in a written "Resolution" of the same date. The Resolution is "notice[d] to" various concerned officers and Departments of the corporation including the "President" and "Directors." It states that the Board of Directors has resolved to grant Cariven a guarantee to finance its purchases of "twin ships" and that "[t]he granting of the guarantee is conditioned and subject to" the list of requirements which follows.

5 The action taken by the Venezuelan Cabinet ("Council of Ministers") at its meeting of March 7, 1974 is summarized in a letter

Plaintiff asserts that since its guarantees are described on the face of the promissory notes as being "duly authorized" by the CVF Board of Directors and the Venezuelan Cabinet, the substance of the resolutions of those bodies (imposing conditions on the issuance of the guarantees) is part of the underlying contract.

It is important to note that plaintiff does not contend that there was an antecedent understanding or prior agreement among the parties evidencing their intention specifically to incorporate these conditions in the written contract of guaranty. Such a contention would prove unavailing, in any event, under the parol evidence rule, since the contract of guaranty here is "complete and clear and unambiguous upon its face." *Intercontinental Planning Limited v. Daystrom,* 300 N.Y.S.2d 817, 822 (Ct. of Appeals 1969). Plaintiff, rather, takes the contract as written and advances either of two alternative theories to support treatment of the conditions imposed by the CVF Board of Directors and the Venezuelan Cabinet as conditions precedent to the contract: the first is that "[i]t has long been settled law that a guarantee given pursuant to legislative authority is subject to the terms of the operative legislation and will be construed in connection therewith"; and the second, that where the authority of an "agent" (the reference is presumably to those officers who executed the guarantees on CVF's behalf) is created or described in a writing, a third party is charged with knowledge of the restrictions upon such authority contained in the writing.

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from the Minister of Finance dated March 8, 1974 (Official Communication HCP-200-0215). The letter states that the Cabinet authorized CVF to grant Cariven a guarantee "on the following conditions." One of these is compliance with "other conditions established by the Board of Directors of CVF in Resolutions Nos. 344 and 117, dated March 13, 1973 and January 23, 1974, respectively."

Plaintiff's guarantees were not given "pursuant to legislative authority" within the meaning of the New York cases plaintiff relies upon. *Lyman v. Rochester Title Insurance Co.*, 37 App. Div. 234 (4th Dept. 1899) (statute required applicant for liquor tax certificate to execute bond in favor of People of the State of New York against violation of the Liquor Tax Law; statute set forth required terms of bond); *People v. Pennock,* 60 N.Y. 421, 426 (1875) (bond required for town supervisor for the faithful discharge of his duties in respect of his custody of public money; form dictated by statute); *People v. Chalmers,* 60 N.Y. 154 (1875) (statute respecting assignment for benefit of creditors required trustee to post bond to secure his faithful performance of duties); *McClusky v. Cromwell,* 11 N.Y. 593, 597 (1854) (canal contractor's bond, for payment of employee's wages, required by statute governing contractors under public works contracts with state; "terms and conditions" of bond fixed, not by contract, but by statute). In those cases, as parenthetically indicated, "statutory bonds" were required to be issued pursuant to the terms of specific laws dictating the terms of the bonds, and the provisions of the laws were, in effect, "read into" the bonds. In the present case, plaintiff does not seek to have its guarantees construed in accordance with a statute delineating the terms of the guarantees and requiring that plaintiff furnish the guarantees. Indeed, plaintiff has not even set forth the "operative legislation" pursuant to which it allegedly issues its guarantees of obligations of Venezuelan companies which seek to borrow funds in the international money markets. There is no contention that this legislation, if it exists, sets out the precise terms of any of CVF's specific guarantees. Thus the cases plaintiff has cited are inapposite.

Plaintiff next contends that Merban was charged with notice of the restrictions on the authority of plaintiff's officers to execute the guarantees. Properly interpreted, the "conditions" that had been imposed by plaintiff's Board of Directors and by the Venezuelan Cabinet were not "restrictions" or "limitations" upon the authority of plaintiff's agents but rather conditions precedent to the granting of authority. Essentially, then, plaintiff's argument is that Merban should have known that plaintiff's officers were not authorized to act except upon the fulfillment of the specified conditions.

Plaintiff never argues, however, that, in executing the guarantees, its officers were acting outside the scope of their actual authority; it is not even suggested that there is a triable issue of fact in this regard. To the contrary, the position that plaintiff has taken in this action, factually, is that, at the time of the execution of the guarantees, it was itself of the impression that the conditions had been fulfilled. Thus, as to four of the requirements that had been imposed by its Board of Directors (passenger capacity, ship mortgage, increased capital and working capital), plaintiff contends that it was fraudulently misled and deceived into believing that the requirements had in fact been satisfied. The remaining two conditions (approval from the Ministry of Communications and the Controller General), were not found to be unsatisfied until after the execution of the Loan Agreements and guarantees. The question of whether Merban had knowledge of the conditions to the granting of the guarantees, or a duty to inquire as to their existence, is irrelevant, so long as plaintiff itself authorized its officers to act in the belief that the conditions had been fulfilled; once authorized, plaintiff's agents acted without restriction, as noted above. Since

plaintiff has not suggested or even intimated on this motion that, at the time of their execution of the guarantees, plaintiff's officers were acting at anything but the behest of plaintiff as principal, plaintiff is bound by the acts of its agents within the scope of their actual authority. *Rolfe v. Hewitt,* 227 N.Y. 486, 491 (1920); 2 N.Y. Jurisprudence § 75. This is true even if plaintiff's granting of the authority was the result of the deception of third parties (other than Merban), see, *e.g., United States v. Basil's Family Supermarket, Inc.,* 259 F. Supp. 139 (S.D.N.Y. 1966); see also, *United States v. Spice N Nice, Inc.,* 262 F. Supp. 627, 629 (S.D.N.Y. 1967), or of misinformation, oversight or negligence on the part of plaintiff's own agents. Nothing in traditional agency law would make Merban into an insurer that plaintiff's own internal requirements were complied with, or that the judgment of plaintiff's agents on that score was exercised wisely or correctly. See, *e.g., Restatement (Second) of Agency,* § 165A, comment "a" ("Where authority is stated to be conditioned upon the existence of specified facts, the agent may be authorized to act if he is reasonable, although mistaken, in believing such facts to exist. If the agent is unreasonable in believing such facts to exist, he is unauthorized to act for the principal. Nevertheless, the principal is bound by the agent's act as in other situations involving negligent mistakes by agents"). Under the foregoing principle, if plaintiff's agents were mistaken or negligent in determining whether their own conditions had been satisfied, plaintiff was nonetheless bound.

This holding would resolve the issue of the alleged "conditions precedent" in Merban's favor, as a matter of law, were it not for the fact that one of the six alleged conditions—approval of the Venezuelan Controller

General—is listed as a condition in the Loan Agreements themselves[6] and thus stands on a significantly different footing from the others. Plaintiff does not deny, in respect to the April Agreement, that Merban, through its Vice-President, Robert J. Redmond, sent plaintiff a Telex message on April 30, 1975 stating that Merban would sign the Loan Agreement only upon the receipt of a return message advising that the approval of the Controller General had been received. Nor does plaintiff deny that Merban received the same day in return a Telex message from plaintiff confirming unconditionally that the Controller General had approved the transaction. Plaintiff's argument is that the aforesaid approval of the Controller General was "legally ineffective" under Venezuelan law. As to the October Agreement, plaintiff contends that no approval from the Controller General was ever forthcoming.

On both issues, the parties are in dispute. In response to plaintiff's contentions, Merban has refused to concede non-compliance with the requirement of approval from the Venezuelan Controller General. The issue is one of fact, therefore, that should be resolved at trial, and legal questions pertaining thereto (possibly of waiver and estoppel) will be reserved for that time.

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6 It should be noted that the necessity of approval from the Venezuelan Controller General is referred to, in somewhat varying terms, in *both* the March 8, 1974 letter of the Minister of Finance, summarizing the meeting of the Venezuelan Cabinet of March 7, 1974, and the April and October Loan Agreements. The reference in the Minister of Finance's letter is to the Controller General's approval of the purchase price of the ships to be acquired by Cariven; the reference in the Loan Agreements is to the Controller General's approval "referred to in Article 5 of the Law for the Protection and Development of the National Merchant Marine."

Fraud

The question of the participation of Merban or its officers or agents in a scheme to defraud plaintiff is another that this Court will not determine on the motion for summary judgment. Plaintiff's claim is that defendant Vincent A. DeLyra—acting at least partially on behalf of Merban—engineered an elaborate scheme to induce plaintiff to execute the guarantees of the Cariven financing on the basis of the submission of numerous falsified documents. DeLyra was at once President of Vintero, forty-nine percent stockholder of Cariven and agent of Merban in Venezuela. The available documents do suggest—strongly—that DeLyra conducted his questionable activities without the knowledge and independently of his agency with Merban. But they do not establish this conclusively. On a motion for summary judgment, all ambiguities and reasonable inferences must be drawn in favor of the party against whom summary judgment is sought. *Heyman v. Commerce and Industry Insurance Company,* 524 F.2d 1317, 1320 (2d Cir. 1975). And, as Professor Moore cautions, the remedy is "apt to be inappropriate in an action based on a complex scheme of fraud where the court is asked to decide the motion on lengthy affidavits and documents and voluminous depositions." 6A Moore's Federal Practice ¶ 56.17[27]. On the basis of the parties' submissions thus far, and without the benefit of live testimony, the Court is simply not able to make a conclusive determination as to whether or not the fraud allegedly perpetrated by DeLyra was within the scope of his actual or apparent agency with Merban. Resolution of this issue must await the test of trial.

Status of Intervenors

To defeat the holder in due course status of intervenors, plaintiff suggests, in the first instance, that they are not "holders" of the promissory notes in which they have purchased participating interests. The facts with respect to the rights of intervenors are largely contained in documents and letters which have been submitted for the Court's consideration and are not the subject of factual dispute. The Notes are not in the physical possession of intervenors but rather in the custody of Chemical (in the case of the April series of Notes) and Security Pacific (in the case of the October series). Merban arranged for the delivery of the Notes to Chemical and Security Pacific with instructions to these banks to issue participation certificates to purchasers of interests in the Notes. The certificates contain variations in language but, in substance, "irrevocably assign"[7] to each intervenor the amount of its participation in the Notes; the certificates issued to the Canadian banks specifically state that Chemical will treat the holders thereof as the "absolute owner[s]" of the interests covered by the certificates.

The certificates confirm that the role of Chemical and Security Pacific is that of depository and collection

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7 The quoted language appears only in the certificates issued to the Canadian banks; however, those issued to the American banks state, to the same effect:

> "The Merban Corporation ("Merban") * * * hereby acknowledges that LaSalle National Bank [American Security and Trust Company] * * * is the holder of participations to the extent set forth below in the following promissory notes made by Venezolana de Cruceros del Caribe C.A. (the "Maker") and guaranteed by Corporacion Venezolana de Fomento."

agent. The certificates issued by Chemical to each Canadian bank state:

> "We . . . shall present these notes to the Chemical Bank, New York, for collection at their maturity and pay the above amounts to you in accordance with your instructions, if and when the amounts have been received by us in payment of these promissory notes. We shall have no liability or responsibility to the participant other than to account for collections or payments of interest and principal actually received by us on account of the aforementioned.

Those issued by Security Pacific to each American bank state:

> "Subject to the terms and conditions of the Notes and further subject to [Security Pacific] having received from the Maker funds sufficient to pay the entire face amount of each Note, the amounts due in respect of each Participation shall be payable upon presentation of this Certificate at the aforesaid office of [Security Pacific].
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> * * * * *
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> "[Security Pacific] shall have no duty, liability or responsibility in any capacity (whether of agency, trust or otherwise) to the Participant or any other person except to present the Notes for collection at maturity and account to the Participant to the extent of its Participation for amounts received by [Security Pacific] in respect of the Notes and no other duty, liability or responsibility shall be inferred or implied."

The first issue raised by plaintiff is whether intervenors can qualify as "holders" of negotiable instruments under Article 3 of the New York Uniform Commercial Code (hereinafter "UCC") in the face of the fact that they never took physical possession of the promissory notes. U.C.C. § 1-201(20) defines "holder" as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." A person becomes the holder of an instrument through its negotiation to him. U.C.C. § 3-202(1). If the instrument is payable to order, it is negotiated by delivery with any necessary indorsement(s). U.C.C. § 3-202(1). If it is payable to bearer, delivery alone is sufficient. U.C.C. § 3-202(1).

The promissory notes at issue in the present case were originally payable to the order of Merban; when Merban endorsed them in blank,[8] they became payable to bearer and could be negotiated by delivery alone. U.C.C. § 3-204(2).

The U.C.C. defines delivery as the "voluntary transfer of possession." U.C.C. § 1-201(14). It does not specify, however, whether delivery may be either "actual" or "constructive." Under § 2 of New York's former Negotiable Instruments Law (in effect prior to the adoption of the U.C.C.), "delivery" was defined as the "transfer of possession, actual or constructive, from one person to another." There appears to be general agreement that since the U.C.C. does not prescribe any

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8 Although the participation certificates issued by Chemical state that the Notes were indorsed to Chemical's order, this is an obvious misstatement; an examination of the reverse side of the Notes themselves shows that they were indorsed in blank.

new definition of the term, the definition of "delivery" under the prior law should be deemed to continue. See, *e.g., Billingsley v. Kelley,* 274 A.2d 113-118-19 (Md. Ct. of Appeals 1971); *Snyder v. Town Hills Motors, Inc.,* 165 A.2d 293, 294-95 (Superior Ct. Penn. 1960); *2 Anderson, The Uniform Commercial Code* § 3-102:8 at 588 (2d ed. 1971). Plaintiff does not contest this point but rather submits that constructive delivery and possession cannot be found on the facts of this case.

Under the law of New York, constructive delivery may be accomplished through the vehicle of an agent. Thus, in *Wolfin v. Security Bank,* 156 N.Y.S. 474, 476 (App. Div. 1915), *aff'd without opinion,* 218 N.Y. 709 (1916), the Court stated that constructive delivery may be effected " 'by direction to a third person in actual possession of the instrument to deliver it to, or to hold it for, the payee.' " In an earlier case, *Worth v. Case,* 42 N.Y. 362, 367 (1870), the New York Court of Appeals had said, similarly:

> "There is no doubt, that a delivery of a deed or note, or other obligation, to one person in favor of, and for the benefit of another, constitutes a valid and binding delivery as against the party who delivers it, whether the party in whose favor it is delivered is owner of it or not; and for the purpose of protecting his interests, the law holds the party receiving the delivery as his trustee, and makes his acceptance of it the acceptance of the beneficiary. And this, too, whether the person receiving the delivery knows the contents of the instrument or not, and whether he does anything more than merely receive it or not."

See also, *Hall v. Bank of Blasdell,* 306 N.Y. 336, 341-42 (1954).

The essential ingredient of a constructive delivery is that it be made with the unmistakable intention of transferring title to the instrument. *Bacal v. National City Bank,* 262 N.Y.S. 839 (Manhattan Mun. Ct. 2d Dist. 1933); *2 Anderson, The Uniform Commercial Code,* § 3-202:38 at 775 (2d ed. 1971). See also, *Grannis v. Stevens,* 216 N.Y. 583, 587-88 (1916); *First National City Bank v. Frederics-Helton Travel Service, Inc.,* 209 N.Y.S. 2d 704, 707 (Sup. Ct. N.Y. County 1961).

The undisputed facts in this case establish as a matter of law that Merban intended to relinquish all power and control over the promissory notes to the extent that it sold interests therein to intervenors. Chemical and Security Pacific were specially directed by Merban to issue certificates of participation in the Notes, and the certificates themselves recite Merban's instruction to "irrevocably assign" to intervenors the amounts covered by the Notes. Chemical and Security Pacific are thus the agents through which Merban made constructive delivery of the Notes to intervenors to the extent of their interests therein.

There is no basis for plaintiff's suggestion that the constructive possession of intervenors is negated in this case by the language of the certificates themselves.[9] To the contrary, the banks explicitly obligate themselves in the certificates to account to intervenors (to the extent of

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9 It is certainly of no moment that in the particular certificate issued The Royal Bank of Canada, Chemical describes itself as agent of Merban. Obviousy, Chemical *was* Merban's agent for the purpose of taking custody of the Notes to effect the irrevocable assignment of Royal's participating interest.

their participations) for amounts received in payment of the Notes. The fact that Chemical and Security Pacific also retain possession of the Notes for the account of Merban, to the extent of its retained interest, is not inconsistent with constructive possession by intervenors to the extent of their participating interests. Intervenors are thus "holders" of the Notes under the applicable law.

Drawing upon the Official Comment to U.C.C. § 3-302(4), plaintiff next contends that the holder of a limited interest in an instrument is confined to one with a "collateral security interest" therein as opposed to full equity ownership. As an example of a holder of a limited interest, the Official Comment uses "a pledgee in a security transaction." See also, *Tucker v. Meredith,* 232 F.2d 347 (D.C. Cir. 1956); *In Re Levine's Estate,* 282 N.Y.S. 769 (Surr. Ct. N.Y. County 1935). But there is nothing in either the statutory provision itself or the Official Comment to suggest that this is anything more than illustrative. The statute provides that "[a] purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased." Under the U.C.C., "purchasers" include those taking by "sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(32), (33).[10] The terms of the statute are thus inconsistent with the theory that holders of limited interests are confined to those with "security interests" in negotiable property. Intervenors, in the present case, acquired their participations by "purchase"

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10 The "general definitions" contained in Article 1 are applicable throughout Article 3. U.C.C. § 3-102(4).

within the meaning of § 1-201(32) and are thus holders thereof to the extent of their interests purchased.

Plaintiff has also suggested that, rather than holders of the underlying promissory notes, intervenors should be characterized as owners of "investment securities" within Article 8 of the U.C.C. Plaintiff further submits that the participations held by intervenors fall within the definition of "security" in the Securities Exchange Act of 1934, 15 U.S.C. § 78(c)(10). Whether or not this is the case, however, the participations are not "investment securities" under Article 8. U.C.C. § 8-102(a) provides that a security is an instrument which

> "(i) is issued in bearer or registered form; and
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> "(ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
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> "(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
>
> "(iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer."

None of the certificates produced for the Court's examination is in "bearer or registered form," see U.C.C. § 8-102(1)(d), (c), or "one of a class or series or by its terms . . . divisible into a class or series of instruments." Accordingly, intervenors are holders of the underlying promissory notes, rather than owners of investment securities, and their rights are governed by Article 3 of the U.C.C.

Assuming, *arguendo,* that intervenors are holders of the Notes, plaintiff claims that they did not purchase their interests in good faith and without notice and, therefore, do not meet the requirements for being holders in due course under U.C.C. § 3-302(1).

Plaintiff's argument is built on a single factual premise which is not disputed: that intervenors were in possession of the loan agreements and guarantees at the time that they purchased their participations in the promissory notes. Since the Agreements and guarantees, plaintiff continues, made express reference to the resolutions authorizing their issuance, intervenors should have conducted an investigation and inquiry into the substance of the resolutions prior to their entering into the transaction with Merban. Plaintiff's point, apparently, is that defenses to the guarantor's obligations would then have come to light.

The argument, then, is *not* that intervenors had actual notice of a defense or even "reason to know" of the existence of a defense, see U.C.C. § 1-201(25), from the documents that were available to them. Rather, it is that they breached a duty to inquire and thus failed to act in "good faith."

"Good faith" is defined as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19).[11] It is clear that the draftsmen of the U.C.C. intended to adopt a subjective standard for the good faith test in Article 3, as had been generally applicable under the Negotiable Instruments Law. See, *e.g., Van Gohren v. Pacific National Bank,* 505 P.2d 467 (Wash. Ct. App. 1973); White and Summers, *Handbook of the Law under the Uniform Commercial Code* 472 (1972). In

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11 See footnote 10.

Manufacturers & Traders Trust Co. v. Sapowitch, 296 N.Y. 226, 230 (1947), the New York Court of Appeals formulated the standard as follows:

> "One who purchases commercial paper for full value before maturity, without notice of any equities between the original parties, or of any defect of title, is to be deemed a bona fide holder. He is not bound at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculations in regard to the purchaser's diligence or negligence . . . ."

Bad faith, then, is obviously something far more extreme than a failure to observe reasonable commercial standards or the standards of a reasonably prudent man. It "is not mere carelessness. It is nothing less than guilty knowledge or willfull ignorance." *Manufacturers & Traders Trust Co. v. Sapowitch, supra.* See also, *Hall v. Bank of Blasdell, supra* at 467. The issue, essentially, is whether the circumstances of which the holder has knowledge "rise to the level that the failure to inquire reveals a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a defense arising from the transaction." *General Investment Corp. v. Angelini,* 9 U.C.C. Rep. Serv. 1 (N.J. Sup. Ct. 1971). See also, *Manufacturers & Traders Trust Co. v. Sapowitch, supra.*

It is probable that the written language of the Loan Agreements and guarantees in the present case would not

even have excited the suspicions of a reasonable man. Contrary to plaintiff's assertion, these documents did not refer to the "resolutions" authorizing the issuance of plaintiff's guarantees, although, even if they had, the language might well have been regarded as singularly bland. Rather, they referred to the "meetings" at which the granting of the guarantees was given due authorization. Again, such language would more reasonably have been taken by the potential holder as indicative of the soundness of the Notes than as a danger signal, especially since these were governmental guarantees. And certainly the employment in the guarantees of the phrase "joint and several" liability was not "highly unusual" on its face. Plaintiff has offered no suggestion why it was in the present context.

In any event, even if the "reasonable" course to have followed in this case would have been to make further inquiry, or to retain foreign counsel to investigate the authorization for the guarantees, such conduct was not required under the subjective standard of good faith. What is dispositive here is that the documents that were available to intervenors provided no basis whatsoever for the speculation that an impropriety infected the principal transaction. To the extent that intervenors remained ignorant of plaintiff's Board resolutions or of the "conditions precedent" therein, they were not "willfully" so.

Accordingly, they took their instruments in good faith and without notice and are holders in due course under U.C.C. § 3-302. As holders in due course, they are not subject to the defense of fraud in the inducement asserted against Merban, see U.C.C. § 3-305(2); *2 Anderson, The Uniform Commercial Code* § 3-305:31 at 868 (2d ed. 1971), and are thus entitled to recover

summary judgment against plaintiff on the promissory notes.

Conclusion

The motions of defendants Merban, Redmond and Himoff for summary judgment are denied. The case will proceed to trial on the issue of fraud and on the narrow issue of whether approvals were obtained from the Venezuelan Controller General for the April and October transactions, as required in the respective Loan Agreements.

The motions of intervenors for summary judgment on their counterclaims are granted. Settle judgment on notice.

SO ORDERED.

William C. Conner
United States District Judge

Dated: New York, New York
April 14, 1978

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12 The Court notes that no securities law claim has been pleaded in plaintiff's complaint and therefore none is properly before this Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1671 (WCC)

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff,

—against—

VINTERO SALES CORPORATION, *et al.*,
Defendants,

—and—

CANADIAN IMPERIAL BANK OF COMMERCE, *et al.*,
Intervening Defendants,

—against—

VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,
Additional Defendant on the Counterclaim by Intervening Defendants,

—and—

MERBAN INTERNATIONAL, INCORPORATED,
Additional Defendant on the Second Cross-Claim by Intervening Defendants.

CONNER, *D.J.:*

The Memorandum and Order, dated April 14, 1978, is hereby amended *nunc pro tunc* by adding the attached page 1b thereto.

WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
April 20, 1978

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FRANCISCA A. SABADIE, Esq.
Of Counsel

Judgment of the Second Circuit entered July 28, 1980

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-eighth day of July, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. J. EDWARD LUMBARD

Circuit Judges.

79-7730

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff-Appellant,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP., SECURITY PACIFIC INTERNATIONAL BANK, VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,
Defendants,

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORPORATION, VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,
Defendants-Appellees,

—and—

CANADIAN IMPERIAL BANK OF COMMERCE, THE ROYAL BANK OF CANADA INTERNATIONAL LIMITED, BANQUE CANADIENNE NATIONALE, BANQUE PROVINCIALE, LA-SALLE NATIONAL BANK, and AMERICAN SECURITY AND TRUST COMPANY,

Intervening Defendants-Appellees,

—against—

VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,

Additional Defendant on the Counterclaim by Intervening Defendants,

—and—

MERBAN INTERNATIONAL, INCORPORATED,

Additional Defendant on the Second Crossclaim by Intervening Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By: Arthur Heller
ARTHUR HELLER,
Deputy Clerk

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CORPORACION VENEZOLANA DE FOMENTO,
Plaintiff,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP., SECURITY PACIFIC INTERNATIONAL BANK, VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,
Defendants.

Plaintiff, by its attorneys, Burns & Jacoby, complaining of the defendants, respectfully alleges as follows:

1. Plaintiff is a corporation duly organized and existing under the laws of the Republic of Venezuela, the capital stock of which is wholly owned by the Republic of Venezuela.

2. Defendants Vintero Sales Corporation (hereinafter called "Vintero Sales"), Vintero Corporation (hereinafter called "Vintero Corporation") and The Merban Corporation (hereinafter called "Merban"), are New York corporations having their principal places of business in the County and State of New York.

3. Upon information and belief, defendant Security Pacific International Bank (hereinafter called the "Bank") is a banking corporation organized under the laws of New York having its principal place of business in the County and State of New York.

4. Upon information and belief, defendants Vincent A. de Lyra, Robert J. Redmond and James E. Himoff are citizens and residents of the State of New York.

5. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

6. Jurisdiction is predicated on 28 U.S. Section 1332. This is in part an action for a Declaratory Judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. Sections 2201 and 2202 for the purpose of determining questions of actual controversy among the parties as hereinafter more fully appears.

7. On or about March 13, 1973, by Resolution No. 0344, the plaintiff's Board of Directors resolved to grant Venezolana De Cruceros Del Caribe, C.A., a privately owned Venezuelan corporation (hereinafter called "Cariven"), certain guarantees to facilitate a loan or loans to Cariven in the total amount of approximately $12,000,000.00 to be used to purchase two twin passenger-cargo ships of defined capacity and specifications, it being plaintiff's function to facilitate and make available financing for projects approved by agencies of the Venezuelan government with a view to assisting and encouraging the industrial and commercial development of various aspects of the Venezuelan economy, in this case the Venezuelan Merchant Marine. Resolution No. 0344 specified, among other things, the terms on which the guarantees were to be granted and conditions precedent to which they were to be subject.

8. On or about January 23, 1974, by Resolution No. 0117, the Board of Directors of plaintiff modified Resolution No. 0344 by appending additional conditions precedent to granting said guarantees and affirmed

explicitly that the prior unmodified conditions precedent contained in Resolution No. 0344 were to remain in full force and effect.

9. On or about March 9, 1974, by Official Document No. HCP-200-0215, plaintiff was advised and so advised Cariven that the Venezuelan Cabinet on March 7, 1974 had authorized plaintiff to grant the guarantees referred to in Resolutions No. 0344 and No. 0117 subject to the performance of conditions precedent which complemented the prior conditions precedent of Resolutions Nos. 0344 and 0117.

10. On December 20, 1974, defendant Vintero Corporation issued a pro forma invoice signed by defendant Vintero Sales by its president, Vincent A. de Lyra, for the sale to Cariven of the passenger and cargo ship S.S. Santa Rosa for the sum of $8,895,397.62, said ship to be modified as described in the pro forma invoice and placed into class, it being the general purport and tenor of such pro forma invoice that the S.S. Santa Rosa was capable of being modified to satisfy the requirements specified in the aforementioned resolutions of plaintiff's Board of Directors and decree of the Venezuelan Cabinet as well as applicable Venezuelan laws and regulations, and that after being refurbished through the use of proceeds from a letter of credit, provided for in the invoice, said ship would satisfy such requirements. The letter of credit proposed by the pro forma invoice was to be issued by a New York bank in favor of defendant Vintero Corporation payable as follows: (a) 50% upon delivery of a duly registered first ship mortgage; (b) 25% upon the issuance of certain ship survey certificates; and (c) 25% upon the acceptance of the modification and refurbishing of the ship so purchased, placed in class and

registered with the Venezuelan Merchant Marine, ready for cruise operations.

11. On or about April 30, 1975, Cariven entered into a loan agreement (hereinafter called the "First Loan Agreement") with defendant Merban through its officers, defendants Redmond and Himoff, to which plaintiff was a signatory, in which, among other things, defendant Merban agreed to cause a letter of credit to be opened in favor of defendant Vintero Sales in an amount equal to two-thirds of the concocted purchase price stipulated in the pro forma invoice for the purchase of the S.S. Santa Rosa in exchange for the promissory notes of Cariven to be guaranteed by plaintiff. The loan agreement specifically required compliance with the terms and conditions set forth in the aforementioned resolutions of plaintiff's Board of Directors. Simultaneously therewith, eight promissory notes made by Cariven, bearing guaranty language signed by an officer of plaintiff, were delivered to Merban each in the sum of approximately $726,743.75, aggregating $5,813,950.00.

12. Unbeknownst to plaintiff, the S.S. Santa Rosa was an unregistered vessel which had been the subject of an invitation for bids by the United States Maritime Administration for "scrapping" or operations and for which defendant Vintero Corporation had been the successful bidder at a price of $1,004,746.00. The resale price of $8,895,397.62 for which defendant Vintero Sales purportedly resold the vessel to Cariven was an unconscionable concocted price unrelated to offerings in the world shipping market and in violation of the Venezuelan Law for the Protection and Development of the National Merchant Marine (hereinafter called the "Venezuelan Merchant Marine Development Law"), and

was contrived and devised by defendants for the specific purpose of taking full advantage of the total amount of guarantees which plaintiff was authorized to grant in connection with such a transaction.

13. On or about May 15, 1975, defendant Merban opened a letter of credit with defendant Bank for approximately $5,525,000.00, and thereafter defendant Vintero Sales drew down 50% of said sum by furnishing a mortgage on the S.S. Santa Rosa naming plaintiff as mortgagee in purported compliance with the provisions of the pro forma invoice and letter of credit permitting such a draft against a duly registered first ship mortgage. In truth and fact and so known to the defendants, such mortgage was not a duly registered first ship mortgage but was merely a chattel mortgage filed under the Virginia Uniform Commercial Code, and did not comply with the requirements of the pro forma invoice or the letter of credit, and did not conform to the terms and conditions precedent specified in the First Loan Agreement, in the aforementioned resolutions of plaintiff's Board of Directors and the aforementioned decree of the Venezuelan Cabinet.

14. Upon information and belief, defendant Vintero Sales used the proceeds of the aforementioned letter of credit to pay for its purchase of the S.S. Santa Rosa from the United States Maritime Administration and thus obtained funds for the transaction without investment or risk of its own funds or the funds of Cariven, which was contrary to the requirements of Venezuelan law and the terms and conditions precedent specified in the aforesaid resolutions of plaintiff's Board of Directors and the First Loan Agreement.

15. Subsequent to May 15, 1975, defendant Vintero Sales drew down additional amounts against said letter of credit aggregating an additional 25% of the face amount thereof by certifying that the S.S. Santa Rosa had been placed in dry dock for modification and refurbishing in purported compliance with the provisions of the pro forma invoice and the letter of credit permitting such drafts upon the making of contracts for modification and refurbishing of said ship to conform to the specified requirements. In truth and fact and so known to the defendants, contracts had not been entered into for the modification and refurbishing of the S.S. Santa Rosa to conform to the terms and conditions precedent specified in the First Loan Agreement, the aforementioned resolutions of plaintiff's Board of Directors and the aforementioned decree of the Venezuelan Cabinet.

16. On October 14, 1975, Cariven entered into an agreement (hereinafter called the "Second Loan Agreement") with defendant Merban through its officers, defendants Redmond and Himoff, to which plaintiff was a signatory, in which, in order to enable plaintiff to purchase a passenger-cargo ship known as the S.S. Bahama Star, defendant Merban agreed to cause a letter of credit to be opened in favor of defendant Vintero Sales in an amount equal to two-thirds of the concocted purchase price of the ship in exchange for the promissory notes of Cariven to be guaranteed by plaintiff. The Second Loan Agreement (like the First Loan Agreement) specifically required compliance with the terms and conditions set forth in the forementioned resolutions of plaintiff's Board of Directors. Simultaneously with the execution of the Second Loan Agreement, eight promis-

sory notes made by Cariven, bearing guaranty language signed by an officer of plaintiff, were delivered to defendant Merban, each in the sum of approximately $726,743.75, aggregating $5,813,950.00.

17. On or about November 6, 1975, defendant Merban opened a letter of credit with defendant Bank for approximately $5,252,000.00, and thereafter defendant Vintero Sales drew down 50% of said sum by furnishing a mortgage on the S.S. Bahama Star naming plaintiff as mortgagee in purported compliance with the provisions of the letter of credit permitting such a draw down against a duly registered ship mortgage. In truth and fact and so known to the defendants, such mortgage was not a duly registered first ship mortgage but was merely a chattel mortgage, and did not conform to the terms and conditions precedent specified in the Second Loan Agreement, the aforementioned decree of the Venezuelan Cabinet and the Venezuelan Merchant Marine Development Law.

18. Upon information and belief, subsequent to November 6, 1975, defendant Vintero Sales drew down additional amounts against said letter of credit aggregating an additional 25% of the face amount thereof by certifying that the S.S. Bahama Star had been placed in dry dock for modification and refurbishing in purported compliance with the provisions of the letter of credit permitting such drafts upon the making of contracts for modification and refurbishing of said ship to conform to the specified requirements. In truth and fact, contracts had not been entered into for the modification and refurbishing of the S.S. Bahama Star to conform to the terms and conditions precedent specified in the Second Loan Agreement, the aforementioned resolutions of

plaintiff's Board of Directors and the aforementioned decree of the Venezuelan Cabinet and the Venezuelan Merchant Marine Development Law.

19. Upon information and belief, defendant Vintero Sales used proceeds of the aforementioned letter of credit to pay for its purchase of the S.S. Bahama Star for a price of approximately $1,200,000.00, which vessel defendant Vintero Sales resold to Cariven for a price in excess of $8,000,000.00, which was an unconscionable concocted price unrelated to the offerings in the world shipping market and in violation of the Venezuelan Merchant Marine Development Law, and was contrived and devised by said defendant for the express purpose of taking full advantage of the total amount of the guarantees which plaintiff was authorized to make in connection with the transaction. In this manner said defendant obtained funds for this transaction without investment or risk of its own funds or the funds of Cariven, which was contrary to the requirements of Venezuelan law and the terms and conditions precedent specified in the aforesaid resolutions of plaintiff's Board of Directors and the Second Loan Agreement.

20. Upon information and belief, at various times during 1975, the exact dates being unknown to plaintiff, the notes issued by Cariven and guaranteed by plaintiff pursuant to the First Loan Agreement and the Second Loan Agreement were negotiated by Merban to various holders (hereinafter called "Note Holders") residing in Canada and Europe whose identities are not otherwise known to plaintiff, and the proceeds of such notes have been used by defendant Merban to pay for or to reimburse itself for the obtaining of the aforementioned letters of credit.

21. Upon information and belief, the First Loan Agreement and the Second Loan Agreement are invalid and unenforceable insofar as plaintiff's obligations thereunder are concerned, and the guarantees signed by plaintiff's officers pursuant thereto are void for the reasons hereinafter set forth in paragraphs "22" through "24" below.

22. The terms and conditions precedent specified in the First Loan Agreement and the Second Loan Agreement and incorporated therein by reference to the aforementioned resolutions of plaintiff's Board of Directors, and the requirements of the law of Venezuela, have failed to be performed and observed in the following respects:

(a) A valid first ship mortgage was not obtained and was not obtainable.

(b) The ships purchased cannot be modified to safely and adequately carry 800 passengers each.

(c) The purchase price of each ship was not approved by the Controller General of the Republic of Venezuela.

(d) Approval of each ship was not obtained from the Venezuela Merchant Marine.

(e) Cariven did not legally increase its capital to the amount of the guarantees as required by Resolutions Nos. 0344 and 0117.

(f) Cariven did not obtain the minimum working capital required.

23. Upon information and belief, defendants Vintero Sales, Vintero Corporation, Merban, de Lyra, Redmond and Himoff (hereinafter called collectively the "Conspiring Defendants") conspired among themselves and with others to give the appearance that the conditions precedent to granting the guarantees had been per-

formed, and pursuant to said conspiracy, performed the fraudulent, deceptive, unlawful and illegal activities hereinabove described to procure the guarantees as well as the execution and delivery of promissory notes containing the plaintiff's guarantees, for the use of said defendants and for their joint benefit, advantage, profit and with the intent to deceive and defraud plaintiff and others. Specifically, by engaging in the aforesaid course of conduct, said defendants gave the appearance of compliance with the specified terms and conditions precedent and the applicable Venezuelan laws, and sought to conceal, mask and dissemble their failure to arrange for the modification and refurbishing of the ships, and the fact that the ships did not meet the required specifications. Among other things, said defendants knew that plaintiff relied on the representations contained in the pro forma invoice which representations were false and untrue, and defendants knew that such representations were false and untrue at the time they were made, including representations that the vessel was capable of being modified to satisfy the requirements of Venezuelan law and the resolutions of plaintiff's Board of Directors and that defendants intended to cause such modification to be made when, in truth and fact, the vessel, as defendants well knew, was not capable of being so modified and defendants had no intention of causing it to be so modified.

24. In pursuance of said plan and conspiracy, illegal and improper inducements were used and employed by the aforesaid Conspiring Defendants to obtain plaintiff's guarantees and the execution and delivery of the promissory notes with such guarantees, in that, among other things, said defendants, with others, upon

information and belief, unlawfully and illegally connived and colluded with various persons for the purpose, among other things, of inducing plaintiff to grant the guarantees and to procure the execution and delivery of the promissory notes with the guarantees, and further conspired to sell and distribute such promissory notes to parties in Canada and Europe.

25. As a result of defendants' conduct as aforesaid, plaintiff has been placed in the situation in which it has purportedly guaranteed in excess of $11,000,000.00 of obligations issued for the purchase of ships which do not conform to the specifications set forth in the aforementioned resolutions of plaintiff's Board of Directors, the aforementioned decree of the Venezuelan Cabinet, the First Loan Agreement and the Second Loan Agreement, nor to the requirements of the Venezuelan Merchant Marine Development Law, but plaintiff is purportedly liable on such guarantees notwithstanding that the terms and conditions precedent specified in said resolutions, decree and agreements and the requirements of Venezuelan law have not been satisfied.

26. Plaintiff asserts that the First Loan Agreement and the Second Loan Agreement, and the guarantees signed by plaintiff's officers pursuant thereto, are void and unenforceable, but defendants take the position that such guarantees are in full force and effect and enforceable.

27. By reason of the premises, plaintiff is threatened with irreparable injury and a justiciable controversy exists between the parties.

28. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands that the court adjudge:

(1) That the loan agreements dated April 30, 1975 and October 14, 1975, respectively, be declared rescinded;

(2) That the guarantees of the plaintiff be declared null and void;

(3) That defendant Vintero Sales be enjoined from drawing further against the letters of credit established in its favor in connection with the sale of the S.S. Santa Rosa and the S.S. Bahama Star and the modification, remodeling and refurbishing thereof;

(4) That defendant Merban be enjoined from negotiating any promissory notes guaranteed by plaintiff received and held by defendant Merban in connection with the financing of the S.S. Santa Rosa and the S.S. Bahama Star;

(5) That defendants be adjudged liable to indemnify plaintiff and hold it harmless against any liability on the aforesaid guarantees in the event any Note Holder seeks to enforce same;

(6) That plaintiff be awarded the costs and disbursements of this action; and

(7) That plaintiff be awarded such other, further and different relief as to the court may seem just.

BURNS & JACOBY

By: _____

A Member of the Firm
Attorneys for Plaintiff
Office and P.O. Address
445 Park Avenue
New York, New York 10022
Tel. No. 212 980-3200

Stipulation and Order Dismissing Action against Security Pacific International Bank

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1671 (WCC)

CORPORACION VENEZOLANA DE FOMENTO,

Plaintiff,

—against—

VINTERO SALES CORPORATION, VINTERO CORPORATION, THE MERBAN CORP., SECURITY PACIFIC INTERNATIONAL BANK, VINCENT A. DE LYRA, ROBERT J. REDMOND, and JAMES E. HIMOFF,

Defendants,

—against—

CANADIAN IMPERIAL BANK OF COMMERCE, THE ROYAL BANK OF CANADA INTERNATIONAL LIMITED, BANQUE CANADIENNE NATIONALE, BANQUE PROVINCIALE, LA-SALLE NATIONAL BANK, and AMERICAN SECURITY AND TRUST COMPANY,

Intervening Defendants,

—against—

VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,

Additional Defendant on the Counterclaim by Intervening Defendants,

—against—

MERBAN INTERNATIONAL, INCORPORATED,

Additional Defendant on the Second Cross-claim of Intervening Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the appearing parties herein that the above-captioned action is dismissed against defendant Security Pacific International Bank, without prejudice, without costs to plaintiff against defendant Security Pacific International Bank and without costs to defendant Security Pacific International Bank against plaintiff or any other party herein.

Dated: New York, New York
July 18, 1977

KELLEY DRYE & WARREN

By: /s/_____
A Member of the Firm
Attorneys for Defendant Security Pacific International Bank

BURNS JACKSON MILLER SUMMIT & JACOBY

McHugh Heckman Smith & Leonard,
Trial Counsel

By: /s/_____
A Member of the Firm
Attorneys for Plaintiff Corporacion Venezolana de Fomento

Paskus Gordon & Hyman

White & Case

By: /s/_____
A Member of the Firm
Attorneys for Defendants The Merban Corporation, James E. Himoff, Robert J. Redmond and Merban International, Incorporated

Thacher Proffitt & Wood

By: /s/_____
A Member of the Firm
Attorneys for Defendants Vintero Sales Corporation and Vincent A. deLyra

SHEARMAN & STERLING

By: /s/_____
A Member of the Firm
Attorneys for Intervening Defendants Canadian Imperial Bank of Commerce, The Royal Bank of Canada International Limited, Banque Canadienne Nationale and Banque Provinciale

BAKER & MACKENZIE

By: /s/_____
A Member of the Firm
Attorneys for Intervening Defendants LaSalle National Bank and American Security and Trust Company

SO ORDERED: July 20, 1977

William C. Conner
U.S.D.J.

[Translation]

LAW FOR THE PROTECTION AND DEVELOPMENT OF THE NATIONAL MERCHANT MARINE

"ARTICLE 5.—Any acquisition of ships or equipment by public entities or companies in which the State has a participation, or which is to be realized through the utilization of loans or guarantees extended by official entities, will be subject to the previous approval of the Controller General of the Republic and of the Ministry of Communications. The Regulation will establish the conditions, such as age of the ship, type of maritime insurance, classification, which will have to be complied with in such transactions."

[Translation]

REGULATIONS OF THE LAW FOR THE PROTECTION AND DEVELOPMENT OF THE NATIONAL MERCHANT MARINE

Article 11.

Before proceeding to acquire ships or navigation equipment, the public entities or enterprises in which the State has a participation will send the respective project to the Controller General of the Republic for the purposes of the approval to which Article 5 of said law refers. The Controller General of the Republic will examine the fairness and reasonableness of the prices and the sufficiency and suitability of the collateral.

Whenever the acquisition is to be made by private persons with loans or guarantees from government entities, the Controller General of the Republic will only examine the sufficiency and suitability of the collateral offered to the public entity who may grant the loan or guarantee the transaction.

Likewise, projects will be sent to the Ministry of Communications so that it may examine the forms of the transaction including the characteristics of the ship or navigation equipment, plans, necessary specifications, ship classification and other appropriate matters. If approved, the Ministry will take into account in addition the activity to which the ship or navigation equipment will be used.

In no case will the Ministry of Communications give its approval when it concerns ships for maritime transport whose age may be fifteen or more years.

The control powers that the organic law for the National Public Treasury assigns to the Controller General of the Republic with respect to public entities are excepted in those cases in which it may by proper.

Statute Involved

§ 632. Jurisdiction of United States courts; disposition by banks of foreign owned property.

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any Federal reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any Federal reserve

bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. No attachment or execution shall be issued against any Federal reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court.

Whenever (1) any Federal Reserve bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to the Federal Reserve bank, the payment, transfer, delivery, or other disposal of such property by such Federal Reserve bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of the Federal Reserve bank for or with respect to such property.

Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such

foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the Act of October 6, 1917, as amended, or any

actions, regulations, rules, orders, or proclamations taken, promulgated, made, or issued pursuant to any of such statutes. In any case in which a license to act with respect to any property referred to in this section is required under any of said statutes, regulations, rules, orders, or proclamations, notification to the Secretary of State by the proper Government officer or agency of the issuance of an appropriate license or that appropriate licenses will be issued on application shall be a prerequisite to any action by the Secretary of State pursuant to this section, and the action of the Secretary of State shall relate only to such property as is included in such notification. Ekch such notification shall include the terms and conditions of such license or licenses and a description of the property to which they relate.

For the purposes of this section, (1) the term "property" includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term "foreign state" includes any foreign government or any department, district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term "central bank" includes any foreign bank or banker authorized to perform any one or more of the functions of a banker authorized to perform any one or more of the functions of a central bank; (4) the term "person" includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term "insured bank" shall have the meaning given to it in section 12B of this act. Dec. 23, 1913, c. 6, § 25(b), as added June 16, 1933, c. 89, § 15, 48 Stat. 184, and amended Apr. 7, 1941, c. 43, § 2, 55 Stat. 131.